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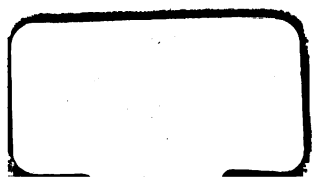
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THE
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Under the Superintendence and Control of the
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IN
THE PRIVY COUNCIL
ON APPEAL FROM
THE EAST INDIES.

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ERRATA.

On page 185, line 10, *delete v.* after Lulloobhoy.

On page 194, last line, *for* 3 Bomb. read 5 Bomb.

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IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

HEMCHAND DEVCHAND	PLAINTIFF;	J. C.*
AND		1905
AZAM SAKARLAL CHHOTAMLAL	DEFENDANT.	July 13, 14,
		20;
		Dec. 18.
FROM THE COURT OF THE AGENT TO THE GOVERNOR, KATHIAWAR, BOMBAY PRESIDENCY.		
AND		
TALUKA OF KOTDA-SANGANI	PLAINTIFF;	
AND		
STATE OF GONDAL	DEFENDANT.	
FROM THE GOVERNOR OF BOMBAY IN COUNCIL.		

Right of Appeal to the King in Council—Appellate Orders of the Governor of Bombay in Council—Decrees of Courts of Political Agents in Kathiawar—British Political Tribunals in a Foreign State—Courts established by the Executive for Political Purposes—Suits to enforce and redeem a Mortgage.

The intention of the British Government is and always has been that the jurisdiction exercised in connection with the province of Kathiawar should be political and not judicial in its character; the ultimate appeal being to the Secretary of State for India in Council. Kathiawar is not as a whole within the King's dominions. It has been controlled by the British Indian Government for a very long period in different degrees

* *Present*: THE LORD CHANCELLOR (Earl of Halsbury), LORD MACNAGHTEN, LORD DAVEY, LORD JAMES OF HEREFORD, LORD ROBERTSON, and SIR ARTHUR WILSON.

J. C.

1905

HEMCHAND
DEVCHAND

v.

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in its various component States, but has never been treated as British territory or as subject to the laws in force in the Bombay Presidency or enacted by the British Indian Legislature. Nor has there been any authoritative assertion of territorial sovereignty therein. A system of judicial administration has been established therein, not by legislation, but by orders of the Executive Government, the judicial officers being Assistant Political Agents, with an appeal to Political Agents to deal with cases both political and civil. In the former cases their functions are "diplomatic and controlling," deciding as they "think proper"; in both the intention of the Government is and has been that the jurisdiction exercised should be guided by policy rather than by strict law:—

Held accordingly in two suits, one classed as civil to enforce a mortgage, and the other classed as political to redeem a mortgage, brought in the Courts of Assistant Political Agents in Kathiawar, that an appeal does not lie from appellate orders therein passed by the Governor of Bombay in Council to His Majesty in Council.

THESE two appeals, brought by special leave, were heard together. The first was from orders (February 22, September 8, and September 22, 1902) of the Court of the Political Agent, Kathiawar, now called the Court of the Agent to the Governor in Kathiawar. The second was from an order (January 14, 1904) of the Governor in Council of Bombay rejecting the appellant's appeal against an order of the Agent to the Governor in Kathiawar, and refusing the appellant's application for the execution of a judgment and decree of the Governor in Council of Bombay dated September 26, 1899, on the ground that both the judgment and decree had been reversed by His Majesty's Secretary of State for India in Council.

The main questions raised in these appeals were whether an appeal lies to His Majesty in Council from the Agency Courts in Kathiawar, or from a decision of the Governor in Council of Bombay on appeal from those Courts, and whether in a suit of which the subject-matter is one of municipal or civil law, and which has been duly heard and decided by those Courts in Kathiawar and by the Governor in Council of Bombay acting as a Court of Appeal therefrom, His Majesty's Secretary of State for India in Council has jurisdiction to reverse, alter or otherwise modify such decision.

The appellant in the first appeal sued under the circumstances stated in the judgment of their Lordships to enforce a mortgage of village Sardharpur in Jetpur, in Kathiawar, in the Court of the

Assistant Political Agent, Sorath Prant. On November 24, 1901, that Court refused to entertain it without a certificate of the Political Agent consenting to the hearing. This order was on February 22, 1902, confirmed by the Court of the Political Agent. On September 22 of that year the same Court refused leave to appeal to His Majesty in Council, on the grounds that the appellant was not a British subject, but the subject of the independent State of Jetpur, and had, therefore, no birth-right of appeal to His Majesty in Council, but only to the sovereign of Jetpur; that the inhabitants of Jetpur and of the Kathiawar States were foreigners; that the jurisdiction exercised by the Agency Courts was native State jurisdiction; and that the said Courts were not British Courts from which an appeal lay to the King in Council. On May 16, 1902, pending the petitions for leave to appeal, the appellant was ejected from the village in suit by order of the Assistant Political Agent, which was confirmed by the Court of the Political Agent on September 8 following. On March 12, 1903, the appellant obtained special leave to appeal from the orders of the Political Agent; including a third one refusing leave to appeal.

In the second case the appellant instituted a suit (Political Case No. 15 of 1881—1882) in the Court of the Assistant Political Agent, Halar Prant, in Kathiawar, for redemption of a mortgage of the village Karmal Kodta. An application by the respondent to transfer it from the political to the civil side was refused in August, 1886, the refusal being affirmed on appeal by the Political Agent, and eventually by the Governor in Council of Bombay on June 15, 1887. The suit was said to have been tried in all respects in accordance with the ordinary procedure of the Court as regulated by Act XIV. of 1882. The Assistant's Court on April 19, 1897, dismissed the suit. The Political Agent affirmed this dismissal on appeal. The Governor in Council in September, 1899, reversed these dismissals on second appeal and decreed redemption; but on appeal to the Secretary of State the decision of the Governor in Council was reversed, and the decrees of the political officers in Kathiawar re-established. The appellant then applied to the Courts in Kathiawar for execution of the Governor's decree of

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J. C. redemption in 1899 on the ground that the Secretary of State had no jurisdiction to reverse it, the subject of the suit being matter of municipal law and the Secretary of State in Council not being a Court of law or a Court of appeal from the final decision of a Court of law in India. These applications were refused, the Agency Courts, and eventually the Governor in Council, on January 14, 1904, holding that they were bound by the decision of the Secretary of State. On August 10, 1904, the appellant obtained special leave to appeal to the King in Council from the final order of the Governor.

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Haldane, K.C., and *J. W. McCarthy*, for the appellants in both cases, contended that an appeal lay to the King in Council from the Courts of Kathiawar—first, because Kathiawar was British territory inhabited by British subjects, and not foreign territory inhabited by the subjects of native sovereign princes; secondly, because the Courts in question were British Courts exercising jurisdiction in Kathiawar.

With regard to the first point it was contended that Kathiawar formed part of British India as defined in s. 18 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), it being a territory or place within His Majesty's dominions, which is for the time being governed by His Majesty through the Governor-General of India or through a governor or other officer subordinate to the Governor-General of India. The province of Kathiawar consisted of a number of small States under tributary chiefs or talukdars, who appear to have been about 400 in number. Prior to 1802 the whole province was divided between the Peshwa and the Gaikwar, who claimed over it sovereign rights, chiefly consisting of the exaction of tribute, and the sovereignty over the country was in the power to which tribute was paid. As regards the rights of this Peshwa, many taluks and villages and a considerable portion of Kathiawar were ceded to the British Government in 1802 by the Treaty of Bassein, and the rest of the rights of the Peshwa in those parts of Kathiawar which had not been transferred in 1802 were ceded to Great Britain in 1817. As regards the Gaikwar in 1807 a settlement was made for the payment to the British Government of the tribute payable

by Kathiawar chiefs to the Gaikwar, and since that date this tribute has been collected by the British authorities, who have then paid to the Gaikwar the share to which he is entitled under existing agreements, and in 1820 by a further agreement the Gaikwar engaged not to interfere in the province except through the British Government. Further, in 1807 and 1808 the chiefs entered into agreements giving a security bond for the general peace of the country and agreeing (inter alia) "to do nothing thenceforward without the sanction of the Government previously obtained." Since 1820 the supreme authority in Kathiawar, as far as it had been previously vested in the Peshwa or the Gaikwar, has been exercised solely by the British Government. Since that date Political Agents and other officers have been appointed to govern the province and the authority of the British Government has been generally exercised over the whole province. As regards the judicial administration, down to 1831, this was left in the hands of the chiefs without regular control. In 1831 the British Government established a Criminal Court of Justice under the presidency of the Political Commissioner for the trial (inter alia) of crimes committed by petty chiefs upon one another or otherwise than in the exercise of their recognized authority over their own dependents, and until 1853 every sentence of this Court was submitted to the Bombay Government for their approval. In 1862 the whole administration was re-organized, and the province was divided into four districts under political assistants with other British magistrates under them, all under the control of the Political Agent. At the same time the number of Kathiawar States under separate chiefs being 188, these chiefs were divided into different classes, on whom was conferred certain criminal and civil jurisdiction varying according to each class. All other jurisdiction both civil and criminal throughout the province beyond that allowed to the chiefs was reserved to the British officers and magistrates under the authority of the Political Agent, and this has been termed "residuary jurisdiction." Codes, moreover, both civil and criminal, have been promulgated establishing regular Courts of justice. The Civil Code distinguishes the chiefs of Kathiawar from "sovereign powers" or "independent

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chiefs." Since 1862 the whole jurisdiction exercised by the chiefs has been treated as conferred upon them by the British Government. Since 1820 the chiefs in Kathiawar have in no sense been sovereign native princes or independent. Many of them are merely heads of villages, and have throughout been under the control and authority of and subject to the British Government. The Courts of the Assistant Political Agent, Sorath Prant, and of the Political Agent, Kathiawar, are British Courts in Kathiawar exercising the residuary jurisdiction reserved to the British authorities and are Courts of justice within a British possession, and for these reasons an appeal lies from them to His Majesty in Council under 7 & 8 Vict. c. 69. Reference was made to *Damodhar Gordhan v. Deoram Kanji* (1), in which the Privy Council went some way towards holding that Kathiawar is British territory; Ilbert's Government of India, p. 1; Hunter's Brief History of the Indian People, p. 160; to various minutes of the Government of India printed in the record, and in particular to Sir B. Frere's minute of March 21, 1863; Kathiawar Directory, 1886, Part II., pp. 822, 1182; Foreign Jurisdiction Act (XXI. of 1879), and Act XX. of 1876.

The Government of India has always possessed two sets of powers, one set derived originally from the Crown, but exercised at one time by the East India Company, and then in 1858 transferred to the Governor-General in Council, another set which grew up in the Crown, as its sovereignty grew, and was never parted with to the Company. The Foreign Jurisdiction Act (XXI. of 1879), and the Indian Order in Council, 1902, under the Imperial Foreign Jurisdiction Act, 1890 (see Statutory Rules and Orders, 1902, p. 174, No. 466), now regulate the exercise by the Governor-General of his prerogative powers which were always vested in the Crown. Acting under this prerogative authority, the Governor-General had power to determine the law and procedure to be observed by Political Agents in Kathiawar, and by so doing, indirectly restricted the sovereignty of the chiefs. The British Government is in receipt of tributes, maintains troops, exercises all civil and criminal jurisdiction through its own officers, except so far as it has conferred a limited jurisdiction

(1) (1876) 1 App. Cas. 332; S. C. 3 Ind. Ap. 102.

on chiefs and landowners, and, as regards the powers which it confers, it exercises the fullest control. It also makes rules for the police and regulates the abkari, or excise. This extent of interference is sufficient to shew that the British Government has practically assumed the sovereignty of Kathiawar. Reference was made to various minutes of Government officers from 1821 to 1864 in support of this view of the political relations with Kathiawar.

It was contended that it was sufficient to establish the second ground of appeal, viz., that the Courts in question were set up by the King, like any other Courts; that if Kathiawar is foreign territory the Agency Courts are as much King's Courts as other extra-territorial Courts. In this case, however, they are not set up by any capitulations or treaties, but as the result of conquest and of sovereign power. They are Courts within the meaning of the Foreign Jurisdiction Act (53 & 54 Vict. c. 37), s. 16, and consequently an appeal lies therefrom to the King in Council. Further, they are Courts which are governed by the Indian Civil Procedure Code, which provides for such an appeal. The appeal can only be taken away by the prerogative. The decision of the Bombay High Court that Palitana in Kathiawar is a sovereign State, see *Ladkuwarbai v. Ghoel Shri Sarsanji Pratabsanji* (1), is based on Sir C. Wood's despatch of 1854, and is contradicted by the decision of the Calcutta High Court in *Empress v. Keshub Mahajun*. (2) And see also *Hursee Mahapatro v. Dinobundo Patro*. (3)

The distinction between "political" and "civil" suits in the Kathiawar Agency Courts is dealt with and regulated by numerous Government notifications, circulars, resolutions and rules of Court, the effect of which is that suits are to be considered as "political" when a chief of some specified class is a party, or when the case is one affecting the interests of the tributary chiefs, of whatever class, in regard to sovereign rights, jurisdiction, tribute, territory, boundaries, political status, or prerogative and certain other matters. The judges of the Agency Courts of Kathiawar exercise both executive and

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(1) (1870) 7 Bomb. H. C. O. C. J.
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(2) (1882) L. L. R. 8 Calc. 985.

(3) (1881) L. L. R. 7 Calc. 523.

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judicial authority, and if a "political" suit is instituted in which the subject-matter relates to civil rights of the parties arising out of contract or otherwise, and in which the matter is one of ordinary civil or municipal law, it falls within the judicial authority, and proceeds as an ordinary civil suit, with the exception that the parties are relieved from the payment of certain fees on instituting the suit. If a "political" suit raises questions outside the ordinary legal rights of the parties and outside matters of ordinary civil or municipal law, whether such questions affect the political status or rights of the parties, or are matters of general policy to be dealt with by the Government or its executive tribunals or officers, such suit falls within the executive authority of the Political Agent or Agent to the Governor, and does not proceed as an ordinary civil suit.

The first of these suits was a civil suit. The second was originally entered in the Agency Court of Halar Prant as a "political" case, solely because the parties thereto were members of the specified class of chiefs, and were therefore entitled to privileges such as the exemption from payment of institution fees in the Court, but as far as regards its subject-matter the suit was an ordinary civil suit for the redemption of a mortgage, and raised only questions of civil or municipal law and of the rights of the parties under contract.

Cohen, K.C., and *Phillips*, for the respondents in the first appeal, contended that no appeal lay to the King in Council. They contended that Kathiawar was not a part of British India, but was native territory under the suzerainty of His Majesty. On the further question raised by the appellant, they contended that the Courts were not British Courts exercising British jurisdiction, but were tribunals exercising a jurisdiction conferred on them by the executive authorities, and limited by rules prescribed by them from time to time. The 780 native States of India are not subject to the Crown, though to a certain extent in a state of dependence thereon. In *Damodhar Gordhan's Case* (1) it was held that the Government could not remove any part of British India from the ordinary jurisdiction of the British Courts. If, therefore, Kathiawar is in British India, the Courts

(1) 1 App. Cas. 332.

of the Political Agents had no jurisdiction to deal with the case, being illegally established; and all notifications and rules issued in regard to them were invalid. Only Courts established by the Legislature would have jurisdiction. In *Queen v. Burah* (1) it was held that, by enactments of Parliament or of the Indian Legislature, any part of British India might be removed from the jurisdiction of the ordinary Courts. No Act has been passed relating to the Courts of Kathiawar. The Executive can only establish Courts therein if it be outside British India. The province of Kathiawar was, and is, governed by a large number of native Rajpoot chiefs, independent of one another, who formerly paid tribute to the Peshwa and the Gaikwar of Baroda, two Mahratta chiefs, subordinate in theory to the Great Mogul at Delhi. In 1802, by the Treaty of Bassein, the Peshwa ceded part of his claims to tribute to the British Government, then represented by the East India Company (Aitchison's Treaties, 3rd ed. Vol. VI. p. 58). The East India Company thereafter, in concert with the Gaikwar, collected the Kathiawar tribute. The Peshwa in 1803 or 1804 farmed his rights to the Gaikwar for ten years. In 1817 he ceded whatever rights remained to him to the East India Company, and in 1820 the Gaikwar made a similar cession. Thereafter engagements were entered into between the chiefs, who mutually guaranteed the performance of each other's obligations, and the Indian Government, by which the chiefs agreed to pay a tribute fixed in perpetuity, with security for its due payment, and the British Government undertook to protect them from oppression, and engaged that the Mulkigiri (2) army should not be employed as theretofore. The chiefs were left perfectly independent in their internal administration; the paramount power (which was the East India Company from 1820) not then claiming and never having exercised any right to interfere in their internal administration except for the better security of the tribute. The question of

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(1) (1878) 3 App. Cas. 889; S. C. L. R. 5 Ind. App. 178.

(2) "Periodical progress or incursion of a military force for the collection of tribute or revenue by violence or intimidation": Wilson's

Glossary, *s.v.* This meaning seems purely local. In old Anglo-Indian cacography, "mooluckgerry." Wilson by a strange slip misspells the common word *mulck* with a final *q&f*.—F. P.

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fact, whether Kathiawar is or is not a part of British India (see 52 & 53 Vict. c. 63, s. 18, and the Indian General Clauses Act X. of 1897, s. 8, sub-ss. 7 and 28), can only be determined in one of two ways, either by studying the past relations between the Crown or Indian Government and the States of Kathiawar, or by obtaining information from the Secretary of State, as was done in *Taylor v. Barclay* (1), and *The Charkieh*. (2) Such a proceeding is permitted by the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 87), s. 4. Various opinions of leading officers of the British and Baroda Governments, and despatches given in the record, were referred to as shewing that Kathiawar was regarded as a foreign country, subject to occasional interference if peace and order required it. The Bhaunagar Act of 1876 is the only instance of Indian legislation with regard to Kathiawar, and by that Act the Government disclaimed the territory. It is not a scheduled district under Act XIV. of 1874. Not being part of British India, the Governor-General in Council had power in his executive capacity (see Ilbert's Government of India, pp. 452, 455, 458, 459, and 574), as regulated by Act XXI. of 1879, to issue the notification in dispute in this case (June 22, 1900) and to entrust power to his executive officers to administer justice subject to his directions. If it were part of British India, the Legislature alone could establish judicial Courts and authority. The notifications in the Kathiawar Directory shew how the Political Agents' Courts were established, what appeals were allowed, and what law was administered. A Political Agent (see s. 3 of Act XXI. of 1879) is an officer appointed by virtue of the executive authority to watch over peace and good order in a native State, and is invested with a certain kind of jurisdiction. By Macpherson's List of British Enactments in Force in Native States, published by authority of the Government of India, the Kathiawar Agency is included amongst the native States. The appellant's only remedy is to apply to His Majesty, who could, under s. 4 of 3 & 4 Will. 4, c. 41, refer the matter to this Board: see the case of the *Nawab of Surat* (3), and Safford and Wheeler's Privy Council, pp. 769, 770.

(1) (1828) 2 Sim. 213, 220.

(2) (1873) L. R. 4 A. & E. 59, 74.

(3) (1855) 9 Moore, P. C. 88.

Sir E. Clarke, K.C., and *Birdwood*, for the respondent in the second appeal, contended that the decision of the Governor of Bombay in Council in September, 1899, in favour of the appellant had been validly (see 21 & 22 Vict. c. 106, s. 3) reversed by the Secretary of State, and that after that reversal there remained no decision in his favour capable of being executed against the respondent. Consequently the subsequent order of the Governor in Council refusing execution was a valid order and it was moreover a political act. They contended that the Agency Courts in Kathiawar which dealt with this case, are not Courts of justice within a British possession within the meaning of 7 & 8 Vict. c. 69 nor British Courts in a foreign country within the meaning of 53 & 54 Vict. c. 37. The preamble of the Bhaunagar Act of 1876 recognizes that Kathiawar is not British territory: and see *Ladkuvarbai v. Ghoel Shri Sarsangji* (1); *Triccam Panachand v. Bombay, &c., Ry. Co.* (2); *Queen-Empress v. Abdul Latif*. (3) It has never been vested in the British Crown under 21 & 22 Vict. c. 106, and is not governed by His Majesty within the definition of British India in s. 18 of the Interpretation Act, 1889, and s. 3, sub-s. 7, of Act X. of 1897; certain powers of government are exercised, but not in such a way as to displace the native sovereignty. There are very important powers which are not exercised. As regards legislation the Indian Legislatures have never made and cannot make laws for Kathiawar. Under the Indian Councils Act, 1861, s. 22, the Governor-General for India in Council can legislate for certain persons within the province, but not in respect of Courts of justice or places or things. The Agency Courts were set up by compact with the chiefs, that is, in pursuance of Colonel Walker's famous settlement of 1807, not by legislation; and are Courts of the native States if Courts at all. Where Indian Acts or adaptations of them have been introduced into Kathiawar they have been applied by executive order, not by legislation, and are merely rules of procedure for the guidance of political officers. The revenue system was examined to shew that it was conducted by the chiefs as their own freed from British jurisdiction or control. So also the police administration was left

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(1) 7 Bomb. H. C. R. O. C. J. 150. (2) (1885) I. L. R. 9 Bomb. 244.

(3) (1885) I. L. R. 10 Bomb. 186.

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in the hands of the native States. Interference has been confined to the judicial administration ; but only a tenth part of the litigation of Kathiawar is dealt with by Political officers exercising jurisdiction on behalf of the chiefs. The inherent jurisdiction of the chiefs extends to all litigation in their territories, but while they are under disqualification it is exercised by the British Government : see the Directory, Part I., 1886, p. 276, Part II., 1886, p. 453, and Macpherson's Enactments in Force in Native States, p. 42.

Kathiawar has never been subject to the system of jurisprudence applicable to British India. Its chiefs have their own Courts and codes of law. The Courts of the political officers are not governed by British laws, but by special rules of procedure prescribed for their guidance : see Kathiawar Directory, Part II., 1886, pp. 822—824, 1182. They are in fact not Courts of justice, though described as such ; certainly not British Courts established by law. Their decisions are guided by political considerations. The cases dealt with by them are classed as civil and political ; but the same officers deal with both classes. The nature of political suits is described in Kathiawar Directory, Part I., 1886, p. 276 ; Part II., 1886, p. 453 ; and Part III. 1896, pp. 38 and 40. In hearing them the Agent as representing the paramount power arbitrates diplomatically between the parties. The present case is undoubtedly political, and the decision of the Governor in Council is not a judgment of a Court acting on principles and rules which the Judicial Committee can investigate and apply. This Board cannot be guided by the same considerations which control the Political Agents. The suzerainty of the Crown has been delegated to them through the Government of India. The laws which have been introduced are so many rules of procedure within the meaning of s. 5 of Act XXI. of 1879. This second appeal is an interstatal case involving sovereign rights over a particular village. The political jurisdiction exercised in such a case is one of the methods by which the suzerainty of the Crown is exercised and is entirely distinct from the jurisdiction exercised by the High Courts in British India and by His Majesty in Council in appeal therefrom : see *Maharajah Madhava Singh v. Secretary of State for India in Council*. (1) Formerly the appeal lay from the Governor

(1) (1904) L. R. 31 Ind. Ap. 239.

in Council in such cases to the Court of Directors. Under s. 3 of 21 & 22 Vict. c. 106 it is to the Secretary of State. It cannot be contended that this long-established procedure was wrong; but if Kathiawar was part of British India no such appeal would lie, and the decisions would have been coram non judice in every case from the Assistant Political Agent up to the Governor in Council.

Haldane, K.C., replied in both appeals.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The first of these appeals arises out of a suit instituted in a Court of the Assistant Political Agent of Sorath Prant, in Kathiawar (the term Prant meaning an administrative district). The grounds of the plaintiff's claim, so far as it has now to be noticed, were that in February, 1898, he had advanced money to the late Darbar Shri Vala Naja Mamaiya, a shareholder in the chiefship or talukdari of Jetpur Chital in Kathiawar, for the purpose of paying off debts due by the latter, who was a talukdar of the sixth class, and that the plaintiff had acquired possession; that Vala Naja died in May, 1901; and that the plaintiff's rights as mortgagee had been interfered with or threatened by the nominal defendant as manager for the substantial defendants, the successors of the deceased chief. The plaintiff prayed for a declaration of his rights and an injunction. In effect, therefore, the suit was one to enforce a mortgage made by a deceased chief against his successors. The Assistant Political Agent dismissed the suit, basing his decision upon a notification of the Government of India, in the Foreign Department, of June 22, 1900, which laid down, for the guidance of the Agency Courts in Kathiawar, the rule that: "No suit shall lie against a tributary chief or talukdar . . . in respect of any debt contracted by the predecessor of such chief or talukdar or sub-sharer unless (a) the claim has been admitted by the tributary chief or talukdar or sub-sharer; or (b) the debt has received the written approval of the Political Agent."

Against that decision the plaintiff appealed to the Political Agent, who, on February 22, 1902, dismissed the appeal. On September 8, 1902, the Political Agent dismissed another appeal

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by the plaintiff against an order of the Assistant Political Agent awarding the defendants possession of the property in dispute. By a third order of September 22, 1902, the Political Agent dismissed two applications of the plaintiff, one for a certificate that the case fulfilled the conditions necessary to support an appeal to His Majesty in Council, the other for leave to bring such an appeal. Against these three orders of the Political Agent the present appeal has been brought.

The plaintiff being dissatisfied with these orders of the Political Agent, his ordinary and regular course would have been to appeal to the Governor of Bombay in Council. But he made an application to His Majesty in Council for special leave to appeal without going first to the Governor in Council, and in accordance with their Lordships' advice, His Majesty in Council granted special leave so to appeal, but with leave to the Secretary of State for India to intervene, and put in a case and appear; in the result the India Office acted for the respondent. The appellant having been thus allowed to come before this Board without first going to Bombay, their Lordships think that the leave so given cannot have the effect of placing the appellant in any better position than he would have been in if he had followed the usual course and had a decision against him by the Governor in Council. So that in this respect, the case stands on the same footing as the second of the present appeals.

The second appeal arises out of a suit instituted by the Thakor of Kotda-Sangani (a Kathiawar State) in the Court of the Assistant Political Agent, Halar Prant, against the State of Gondal, a State of the first class, to redeem and recover possession of a village said to have been transferred by way of mortgage to the latter State by the former. The suit was dismissed by the first Court, and that dismissal was upheld by the Political Agent, Kathiawar. Upon appeal the Governor of Bombay in Council reversed that decision, and gave a decree for redemption. A further appeal was brought to the Secretary of State in Council, who reversed the decision of the Governor in Council.

After various proceedings before the tribunals in Kathiawar, in which the plaintiff sought unsuccessfully to execute the decree of the Governor in Council, notwithstanding its having been

reversed by the Secretary of State, he appealed to the Governor in Council, and asked him to order the execution of his own decree. By an order of January 14, 1904, the Governor in Council refused the application. And against that order the plaintiff has brought the second of the present appeals, having obtained special leave to do so, granted upon the same terms as the leave granted in the first case.

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These two appeals were heard together. The question common to both cases, and the only question which has been argued, is whether an appeal lies to His Majesty in Council. And the answer to that question depends mainly upon the true relation of the Kathiawar States and their people to the British Crown, and upon the nature and character of the control exercised by the British Indian authorities over the administration of justice in those States.

Prior to the year 1802 Kathiawar consisted of a large number of States, independent of one another, each governed by its own chief, but paying tribute in part to the Peshwa and in part to the Gaikwar of Baroda. It is necessary to review certain events that have occurred since that date, but they can be dealt with very briefly; the more so because Kathiawar in its relations with the British Indian Government has commonly been dealt with as a whole; and it may be so dealt with on the present occasion, for the cases presented by the present appellants do not depend upon any circumstances peculiar to the particular States which, or whose rulers or people, are affected, or upon any consideration not applicable to the whole province.

The time under consideration divides itself naturally into two periods, that of the government of British India by the East India Company down to 1858, and that of the direct government by the Crown after that date.

The legal and constitutional position of the Company during the former of these periods was established in a series of judicial decisions, and was finally and fully defined in *The Secretary of State in Council v. Kamachee Boye Sahaba*. (1) The Company exercised a delegated sovereignty over the territories under its government, with all the powers in connection with the external relations of those territories incidental to the exercise of that

(1) (1859) 7 Moo. Ind. App. 476.

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It is obvious that the sovereign power thus delegated to the Company could be exercised by it in India only through its agents and officers in the country. Before the Regulating Act of 1773 (13 Geo. 3, c. 63) the three Presidencies in India were wholly independent of one another; in the government of each, and in the dealings of each with the native States in its neighbourhood, the Company acted through its officers charged with the administration of that Presidency. By the Regulating Act the Governments of Madras and Bombay were placed under the superintendence and control of the Governor-General of Bengal (since become Governor-General of India) and his Council, and close restrictions were placed upon their power of making war or peace or concluding treaties without the approval of the Central Government. Subsequent statutes expressed with greater clearness the subordination of the lesser Governments, and repeated the restrictions upon the exercise by them of various sovereign powers. But subject to that subordination and to those restrictions, those statutes never took away those powers, but, on the contrary, repeatedly recognized their existence. And accordingly in *The East India Company v. Syed Ally* (1) this Board held that a treaty entered into by the Government of Madras, after compliance with the statutory conditions, was a valid exercise of sovereignty. It is well to notice this point, because much that has now to be considered has to do with the action of the Government of Bombay. And as no question has been raised as to the Bombay Government having at all times obtained all necessary sanction, the distinction between the two Governments need not be further noticed.

By the Government of India Act, 1858, the delegation of sovereign power to the Company was determined, and it has since been exercised directly on behalf of the Crown, in India (speaking generally) through the same authorities as before, in England through the Secretary of State.

Under the sovereign power thus delegated for so long to the Company, and since 1858 exercised directly on behalf of the

(1) (1827) 7 Moo. Ind. App. 555.

Crown, the British Empire in India has been built up. Under it new territories have been added to the actual dominions of the Crown; and under it many and various powers, rights, and jurisdictions have been acquired and exercised over territories which yet remain outside the King's dominions. Of the divers ways in which new lands have been brought under the King's allegiance it is unnecessary here to speak. As to the rights and powers of control possessed and exercised over the native States in India with the corresponding restrictions upon the independent action of those States, some, no doubt, are the necessary consequence of the suzerainty vested in the predominant power. Thus, as is recited in 39 & 40 Vict. c. 46, the Indian States in alliance with the Crown, have "no connexions, engagements, or communications with foreign powers." But apart from and beyond the consequences, whatever they may be, flowing from this general source, rights of very varying kinds have been established in connection with the several States. They have different historical origins. The Indian Foreign Jurisdiction and Extradition Act XXI. of 1879 (following the language of the Imperial Act) recites that "by treaty, capitulation, agreement, grant, usage, sufferance, and other lawful means the Governor-General of India in Council has power and jurisdiction within divers places beyond the limits of British India." And that Act proceeded to regulate the exercise of that jurisdiction so far as it was competent for the Indian Legislature to do so, that is to say, so far as it affected persons for whom that Legislature could make laws. The present cases are outside the scope of that legislation.

Such rights over foreign territory differ not only in origin but in kind and in degree in the cases of different States; so that in each instance in which the nature or extent of such rights becomes the subject of consideration, inquiry has to be made into the circumstances of the particular case. In accordance with this, in *Muhammad Yusuf-ud-din v. Queen-Empress* (1), in which the question was as to the nature and extent of the railway jurisdiction vested in the British Indian authorities within the dominions of the Nizam, the case was decided upon the construction of the correspondence in which the cession of the

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jurisdiction was embodied. In the present cases the inquiry is as to the relation of the Kathiawar States and their people to British India, and the character of the control exercised by the British Indian Governments over those States, and particularly with relation to the administration of justice.

It has already been said that, prior to 1802, the numerous States of Kathiawar were independent of one another, but paid tribute in part to the Peshwa and in part to the Gaikwar. By treaties of 1802 and 1817 the Peshwa's rights were ceded to the East India Company. In 1820 the Gaikwar's rights were ceded.

What the nature of the power of the Peshwa and of the Gaikwar was, regarded as a matter of right, and what therefore they ceded to the East India Company, was the subject of frequent and anxious inquiry on the part of the Board of Directors and the Government of Bombay, but no satisfactory result was ever arrived at; and it would be almost hopeless at the present time to attempt to answer that question upon the basis of contemporary evidence. Perhaps the whole truth is told in a sentence of a despatch of the Court of Directors of November 8, 1831: "It can scarcely be doubted, however, that the rights of the Maratta Governments were whatever they found it convenient to claim and had power to enforce." Their Lordships are happily not called upon to enter into any inquiry so difficult as this. The control of the British Indian Government over Kathiawar has been in operation without controversy for a very long series of years. And the nature and character of that control must be ascertained from the manner in which, and the principles upon which, it has, in fact, been exercised. The history of this is therefore of primary importance.

In 1807, at a time when the rights of the Peshwa had been partially, but not completely ceded, and when those of the Gaikwar were still in full force, Colonel Walker was sent to Kathiawar for the purpose of putting an end, as far as might be possible, to the disorders prevailing in the province. In a later despatch of the Court of Directors, of September 15, 1824, it is said: "The objects of the Company's interference in Kathiawar in 1807 were to induce the chiefs to enter into a permanent engagement for the payment of the claims of the

Guicowar Government" (the Peshwa's tribute was at that time farmed to the Gaikwar) "without the periodical Mooluckgerry Circuit, which devastated the country in its progress and absorbed the tribute in its expense, and at the same time to obtain security for the discontinuance of mutual aggression and predatory excursions." Colonel Walker brought about a settlement to which the Gaikwar's Government and the chiefs were parties, of which it is enough to say that it provided for a fixed tribute from each State, secured by a system of mutual guarantees, that tribute to be received by the Company, which should account to the Gaikwar for what was due to him, for the cessation of the Mooluckgerry (1) invasions, and for the maintenance of peace and order between the States themselves.

The next period which it is necessary to consider is 1819 and the few following years. The arrangements made by Colonel Walker for securing the tribute had not been completely successful. Two different officers were instructed to investigate the conditions of the problem. Amongst the subjects of inquiry prescribed one was: "In whom do the chiefs of Kattywar conceive the sovereignty of their country to reside; in the chiefs themselves, the King of Delly [*sic*], or the Governments to whom they pay tribute?" with a number of other inquiries bearing on the same question. Reports were received, the Government of Bombay expressed its views, and the subject came before the Court of Directors in 1824, who, in the despatch to Bombay already referred to of September 15, 1824, dealt thus with the subject: "In your 49th paragraph, Colonel Walker's opinion that the chiefs were otherwise independent, though paying a forced tribute, is questioned, and an inquiry is intimated into the general rights of the British and Gaicowar Governments over the chiefs of Kathiawar. . . . The right of preserving the peace of the country, which you assumed in paragraph 48, appears here to be questionable, and is made to rest on questionable precedents. If Colonel Walker acted on a supposed right he did not thereby make it a real one. But it is at least doubtful if the Maratha Governments in point of fact ever claimed more than tribute. There is no evidence that they ever

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(1) See note at p. 9, ante.

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interfered to maintain the peace of the country, or that they ever sequestrated talooks for means of tribute. The proposed inquiry must therefore resolve itself into this, whether we have derived from them the right of doing the same precise things which they did and nothing more, or the right of directing the same general power to different specific objects according to the difference of our policy."

In 1825 further difficulties had arisen, which the Government of Bombay dealt with as best it could; and on November 28, 1825, the Government addressed to the Court of Directors a letter in which the constitutional position of Kathiawar was very cautiously dealt with. The reply to this and other letters was contained in a despatch of the Court of Directors of July 20, 1830, in which they said: "All the rights which we possess in Kattywar were acquired from the Peshwa and the Guicawar, from the former by conquest, from the latter by mutual arrangements. These rights we considered as limited to the exaction of a tribute with the power of taking such measures as might be essential to the security of that tribute. Beyond this we did not propose to interfere, and we determined to treat the Kattywar tributaries as independent chieftains entitled to the uncontrolled exercise of the power of Government within their own territories, and subject only to the obligation of not molesting our subjects, our allies, or one another, and of paying the stipulated tribute to the Guicawar and to ourselves."

By the year 1830 it was found that disorders still prevailed in Kathiawar, due apparently to the weakness of some of the chiefs. And the Bombay Government instructed the Political Commissioner to visit Kathiawar twice annually, and try persons guilty of capital crimes in the territories of those petty States whose chiefs might be too weak to punish them. The Court of Directors in 1834 approved this plan, adding: "We are glad to find that it has the complete concurrence of the chiefs themselves."

In 1847 it appears that questions arose as to whether offences committed in Kathiawar by sepoys in the Company's service, and by camp followers, were to be tried by court-martial as offences committed in foreign territory, and the decision of the Bombay Government was in the affirmative.

In a despatch of March 31, 1858, the Court of Directors, referring to an opinion expressed by the then Resident of Baroda, said: "We cannot dismiss the correspondence which has arisen out of these questions of jurisdiction without expressing our surprise that an officer in the high political position occupied" (by the officer in question) "should have declared his opinion that the whole province of Kattewar, with the exception of the districts of the Gaekwar, is British territory, and its inhabitants British subjects."

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In and before the year 1863 a further reorganization was found to be necessary, and, as might be expected, the question as to the status of Kathiawar again arose. In 1863 the members of the Bombay Government, in carefully reasoned minutes, maintained the proposition that Kathiawar was British territory. The Government of India did not indorse this view, but in a despatch of April 14, 1864, to the Secretary of State, while discussing the proposed new arrangements, they said: "The next question refers to the law and the system which should be applied to Kattewar. For the due solution of this question it is necessary first to decide whether Kattewar is foreign or British territory; and until we receive an expression of the views of Her Majesty's Government on the question discussed in our separate despatch, the law as at present in force must remain." On the point thus submitted the reply of the Secretary of State, in a despatch of August 31, 1864, was this: "I have read with interest and attention all the arguments which have been adduced on either side by the several members of the Government of India and of Bombay. It is not necessary that I should examine in detail these conflicting arguments, or record an opinion with respect to their relative weight. It is sufficient to say that the chiefs of Kattewar have received formal assurances from the British Government that their rights will be respected, and that the Home Government of India, so lately as 1858, repudiated the opinion that the province of Kattewar was British territory, or its inhabitants British subjects." The arrangements then made will be considered later.

During the period which has hitherto been under consideration, and in subsequent years, the political control exercised over

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Kathiawar has been very complete, but it has been exercised in different degrees in different classes of Kathiawar States. The question of judicial administration will be more fully considered hereafter; at present it may be convenient first to notice a few other points.

It has never been claimed that British Indian law, as such, is operative in Kathiawar; nor, on the other hand, have the Kathiawar States been included in the Scheduled Districts Act (XIV. of 1874), which enumerates certain of the districts forming part of British India, but to which the general law is not necessarily to apply. The British Indian Legislature has never purported to legislate directly for Kathiawar or its inhabitants; but, on the contrary, in the Indian Act, XX. of 1876, it is expressly recited, with regard to an important territory in Kathiawar, that "the British Government have exercised certain powers of government over the said territory, but such territory has never been treated as being British territory, nor as having been vested in the East India Company nor in Her Majesty the Queen of Great Britain and Ireland and Empress of India, and the said Kathiawar villages have consequently never been subject to the laws in force in the Presidency of Bombay." The chiefs, at least in the larger States, have exercised the power of making laws for their own subjects. The police administration has been in their hands. The general revenues have been received and applied by the chiefs, and it appears from a work of high authority (1) that in many cases the revenue is a sum many times as great as the tribute.

As to the course pursued with regard to judicial administration it has already been stated that under the arrangement sanctioned by the Court of Directors in 1884, authority was given to the Political Commissioner to try persons guilty of capital crimes committed in States whose chiefs were too weak to punish them. It may be added that under that scheme sentences passed by the Political Commissioner were subject to the approval of the Bombay Government.

In all subsequent arrangements, the first thing to be noticed is, that they were all carried out, not by any legislative action,

(1) 6 Aitchison, 3rd ed. (1892), pp. 187 et seq., and Appendix 9, p. 48.

but by orders or resolutions of the Executive Government, a course of proceeding which was appropriate if Kathiawar was foreign territory, but quite irregular if it formed part of the dominions of the Crown.

A fairly complete organization of the province was carried out in 1863. The general nature of that settlement is very concisely described in 6 Aitchison, p. 183: "The administration was re-organized by arranging in seven classes all the chiefs of Kathiawar, and defining their powers and the extent of their jurisdiction. The country was divided into four districts, or 'prants,' corresponding with the ancient divisions of Kathiawar, and European officers were appointed to these districts to superintend the administration generally, and more particularly to try inter-jurisdictional cases and offenders who had no known chief, or who were under such petty landholders as might be unable to bring them to trial."

Under the arrangement then made, modified as it has been in some respects by subsequent orders, the chiefs of the first class, who are not many in number but who rule over wide areas, can try any person, except a British subject, even for a capital offence, without any permission from the Political Agent, and their civil jurisdiction is unlimited. The jurisdiction of the chiefs in the second class, who also rule wide areas, is very nearly the same as that of those in the first. The chiefs in the third and the fourth classes have still very wide powers. These are much less in the following classes, down to the seventh, in which the chiefs have very trifling criminal and no civil jurisdiction. In the cases which fall within the power of the chiefs their decision is final, and no judicial appeal lies to any British authority.

British officers have been appointed to deal with the classes of cases withdrawn from the jurisdiction of the chiefs themselves. Those officers and their tribunals are of three classes: (1.) Subordinate Courts—which need not be further noticed in dealing with these appeals; (2.) Assistant Political Agents' Courts; (3.) the Court of the Political Agent. To the latter officer is attached a judicial assistant, whose Court forms part of that of his chief. The titles of the Political Agent and of the Assistant

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Political Agents have now been altered ; but the change appears to have been only one of name, and need not be further noticed.

The Assistant Political Agents have jurisdiction in all classes of cases ; but an appeal lies to the Political Agent, who, according to circumstances, hears it himself or refers it to his judicial assistant.

The cases that come before the Assistant Political Agents, and on appeal from them before the Political Agent, are divided into two classes, political and civil. This division has long been maintained. It is clearly recognized in rules laid down by the Governor in Council in 1874 and in 1888. A fresh set of rules was issued in 1902, in which express instructions are laid down as to what cases should be regarded as political. In this the rules seem, on the face of them, to go beyond their predecessors. But in the despatch of August 8, 1902, which communicated the new rules to the Secretary of State, the Government of Bombay said : "The Rules are simply an issue in authoritative form of existing orders, and contain no new matter" except certain points not now material.

What is laid down in the Rules of 1902 is as follows :—

"2. The following suits should ordinarily be considered political :—

"(i.) Suits to which a chief of any of the first four classes is a party.

"(ii.) Cases affecting the interest of the tributary chiefs, of whatever class, in regard to sovereign rights, jurisdiction, tribute or allied payments, maintenance to members of the chief's family, compensation for injury done by outlaws or highway robbers, territory, boundaries, political status or prerogative.

"*Explanation.*—Claims for inheritance or partition of estates in the families of chiefs below the fourth class should ordinarily be heard as civil suits, but this does not include cases which raise the issue of a right of succession to a chiefship to which jurisdictionary powers are attached, or an issue of an inheritance to, or partition of, any estates in which a jurisdictional chief or tribute-paying talukdar has an interest direct or indirect."

In political cases the Political Agent hears the appeals himself. He is to regard his function as "diplomatic or controlling," and to dispose of the cases "as he thinks proper." Civil appeals he is ordinarily to refer to the judicial assistant.

Of the two appeals now before their Lordships, the first arises out of a case classed as civil, the second out of one classed as political.

From the Court of the Political Agent appeals lie, subject to certain rules, to the Governor of Bombay in Council. And since as far back as their Lordships have been able to trace the matter, a further appeal has been entertained by the Secretary of State in Council.

The first ground upon which it was sought to maintain the competence of the present appeals was that the province of Kathiawar is British Indian territory, and its people within the King's allegiance, and that an appeal lies from the Courts of that province, and from those within the King's dominions, who hear appeals from that province, as from other Courts within British territory.

In support of this contention reliance was placed, first, upon the case of *Damodhar Gordhan v. Deoram Kanji* (1), the judgment in which was said to suggest an opinion that Kathiawar was British territory. It is true that there are passages in that judgment which may fairly be cited as favourable to the contention of the appellants. But in that case the question did not arise for decision, and their Lordships neither decided it nor expressed any opinion upon it. Nor were the materials for a decision which are now before their Lordships then before this Board. That case, too, was one between private persons, in which the Secretary of State was not represented. Reliance was further placed upon opinions expressed by persons of high authority to the effect that Kathiawar was British territory. But the opinions so expressed were overruled by higher authority. Stress was laid, lastly, upon the great extent of the control exercised by the British Indian Governments over the administration of the Kathiawar territories, which it was argued amounted to an actual assumption of sovereignty.

(1) L. R. 1 App. Cas. 332.

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On the other hand, there are the repeated declarations by the Court of Directors and of the Secretary of State that Kathiawar is not within the Dominions of the Crown. Those declarations were no mere expressions of opinion. They were rulings by those who were, for the time being, entitled to speak on behalf of the sovereign power, and rulings intended to govern the action of the authorities in India, by determining the principle upon which they were to act in dealing with Kathiawar.

Those rulings have, in fact, been acted on. Many and various as have been the forms of intervention by the British Indian powers in the affairs of Kathiawar, and large as has been the political control exercised over the province, any assertion of territorial sovereignty has been avoided. No legislative power over it has ever been claimed. The intervention has never been carried further than was judged necessary, in the emergency, for the maintenance of peace, good order, and security. The position of the chiefs has always been respected; and, at least in the case of the more important among them, many of the functions commonly regarded as attributes of sovereignty have been preserved to them. The form adopted in establishing and regulating tribunals in the province has been that which was regular and appropriate if it was not British territory, but quite irregular and inapplicable if it was. And in the first of the appeals now before their Lordships counsel for the Secretary of State disclaimed the view that Kathiawar is within the King's dominions, and maintained that it is not so.

Their Lordships are of opinion that Kathiawar is not, as a whole, within the King's dominions, and it has not been shewn, or indeed contended, that the particular territories out of which these appeals arise are in a different position in this respect from the province generally. The first ground, therefore, upon which it has been sought to sustain these appeals fails.

The second ground upon which it was sought to base the competency of these appeals was that, assuming Kathiawar not to be a part of the King's dominions, still the Courts of the Assistant Political Agents, that of the Political Agent, and that of the Governor in Council, are all the King's Courts, and that the decisions of these tribunals in the present cases were judicial

decisions by those Courts, and therefore subject to review by His Majesty in Council.

In the Court of the Political Agent this contention was disposed of in the first of the present cases upon the short ground that the appellant is not a British subject, and that the right of appeal to the King in Council "is a birthright and appertains only to British subjects, unless specially conferred by legislative enactment." Their Lordships are unable to concur in the view thus expressed. They think that if a Court, administering justice on the King's behalf, makes an order, judicial in its nature, by which some one is unjustly and injuriously affected, the person aggrieved is not precluded from applying to the King in Council to redress his wrong merely by the fact that he is not the King's subject.

The real question is whether in cases like those now before their Lordships the action of the tribunals in Kathiawar, and of the Governor in Council on appeal from those tribunals, is properly to be regarded as judicial or as political. And at this point a distinction arises between the two cases under appeal, because the first of them has been disposed of as a civil, the second as a political, case.

As to the cases classed as political, their Lordships think there is no room for doubt. The rules issued from time to time for the guidance of the Political Agent treat the disposal of such cases as falling within his "diplomatic or controlling function," and direct him to dispose of them "as he thinks proper." And all the other provisions relating to such cases indicate purely political and not judicial action.

The question relating to cases classed as civil gives rise to more difficulty, but, upon the whole, their Lordships are of opinion that no substantial distinction can be drawn for the present purpose between the two kinds of cases.

There is not necessarily any inherent distinction between the nature of political cases and of those treated as civil. It depends in some cases solely upon who are parties to the suit. The two cases now before their Lordships illustrate this. The first of them was a suit brought to enforce a mortgage, the second was a suit to redeem a mortgage, yet one of the cases is civil

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and the other political, because in the latter a talukdar above the fourth class is a party.

The Political Agent is empowered to transfer political cases to the civil class, and dispose of them as such, and this power he is encouraged, and indeed directed to exercise freely.

The instructions from time to time issued by Government as to the disposal of cases suggests strongly that the exercise of jurisdiction, both by the Political Agent and by the Courts below him, is to be guided by policy rather than by strict law. This is illustrated by the notification of Government of June 22, 1900, already referred to, on the strength of which the first of the present cases (a civil case) was decided. That notification appears to follow upon a series of earlier instructions substantially to the same effect. It lays down that "no suit shall lie against a tributary chief or talukdar, or against any sub-sharer of a tributary chief or talukdar, in respect of any debt contracted by the predecessor of such chief, or talukdar, or sub-sharer unless" one or other of two conditions is complied with, one of which conditions is the approval of the Political Agent. In the grounds of appeal before their Lordships questions are raised as to the construction and effect of the notification just cited. But quite irrespective of those questions, there is no doubt as to its validity as a direction by the Executive Government to its own political officers in a foreign State, and it may be used as an example of the kind of rules by which the exercise of jurisdiction is to be governed.

The appeal from the Kathiawar Courts to the Governor of Bombay in Council might perhaps be regarded as a neutral circumstance. But the mode in which such appeals have been disposed of has been political rather than judicial. That disposal is described in a minute (dated October 11, 1877) of the then Governor of Bombay, as being "done in the Political Department of the Government itself; that is, by the Secretary to Government in that Department under the responsible supervision of the member of Council to whom . . . the political business is assigned."

The further appeal to the Secretary of State in Council is a fact of clearer import. In Lord Salisbury's despatch of

March 23, 1876, the practice of such appeals is dealt with as a thing at that date already fully established, and it continues to the present day in civil as well as in political cases. This system of appeal to the Secretary of State affords strong evidence that the intention of Government is and always has been that the jurisdiction exercised in connection with Kathiawar should be political and not judicial in its character.

What occurred in and after 1876 points to the same conclusion. In the despatch of March 23 in that year, already referred to, the Secretary of State, Lord Salisbury, suggested that an Act should be passed, general in character but intended specially for the case of Kathiawar, enabling the Governor in Council, when dealing with appeals, to refer any state of facts or law to the High Court for its opinion. The Bombay Government opposed the suggestion, and in an official letter of August 22, 1878, stated their grounds of objection. After distinguishing between "a system of government according to the will of the ruler," and "a system of government according to law," it was said: "The cases which come before this Government for adjudication are cases which have arisen in States still administered on the former principle." "Such cases can only be justly disposed of on principles of equity in the fullest sense of the term, and not in the circumscribed sense which is familiar to the practice of the High Courts; and sometimes consideration must be given to the political expediency which underlies the relation in which the Government stands to the protected States." The objections so stated prevailed. In 1879 Lord Cranbrook renewed the suggestion of his predecessor, but effect has never been given to it.

Their Lordships will humbly advise His Majesty that each of these appeals should be dismissed.

There will be no order as to the costs of these appeals.

Solicitors for appellants: *Gill, Pugh & Davey.*

Solicitors for respondents in the first appeal: *Solicitor, India Office.*

Solicitors for respondent in the second appeal: *Holman, Birdwood & Co.*

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MAHARAJAH BAHADUR SIR JOTINDRA }
 MOHUN TAGORE }

PLAINTIFF;

AND

SRIMATI BIBI JARAO KUMARI DEFENDANT.

*Government Revenue payable by Putnidar—Bengal Regulation VIII. of 1819,
 s. 3, clause 3—Rent payable to the Landlord—Construction of Kabulyats.*

Where payment by the putnidar of the Government revenue is on the true construction of the kabulyats part of the consideration rendered by the putnidar for the enjoyment of the tenure, and there is no stipulation that it is to be dealt with in the same manner as rent:—

Held, that the Government revenue so payable by the putnidar was not rent payable to the landlord within the meaning of Putni Regulation VIII. of 1819, s. 3, clause 3, and was not recoverable as such by sale under the Regulation.

APPEAL from a decree of the High Court (August 6, 1903), reversing a decree of the second Subordinate Judge of Hooghly (September 20, 1901) so far as it made certain declarations in favour of the appellant.

The question decided was whether, according to the true construction of two putni kabulyats or counterparts of leases executed by the respondent in favour of the appellant, one on the 17th day of Jaistha, in the Bengali year 1292, corresponding with May 29, 1885, and the other on the 31st day of Srabun, in the Bengali year 1300, corresponding with August 15, 1893, read with Bengal Regulation VIII. of 1819, the Government revenue of Rs.40,156 14 9½, payable by the appellant in respect of the zemindari the subject of the putni settlement, which the respondent undertook to pay into the collectorate, is rent within the meaning of the Regulation, and as such recoverable under the summary provisions enacted for the recovery of putni rents by it at the instance of the appellant. The Subordinate Judge held that it was, and made the necessary declarations in respect

* *Present*: LORD MACNAGHTEN, SIR FORD NORTH, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

to it. The High Court was of opinion that it was not, and disallowed the declarations made by the Subordinate Judge.

The Subordinate Judge expressed himself as clear that the Government revenue payable by the respondent under the putni agreement was rent. He discussed various clauses of the two kabulyats, and recognized that a distinction was made in these instruments between the Rs.6000, described as the putni jumma, and the Government revenue. He said: "The distinction seems to have been advisedly made in the kabulyat to keep up the difference between the sum of a number of sums which were to be paid to the plaintiff personally, and the other sum which was to be paid to the collectors of the district. It was evidently thought that the clause providing for the cancelment of the lease on failure of payment would be a sufficient safeguard to ensure prompt payment of revenue." But he considered that "this clause" (providing for cancelment) "being against the provisions of the Regulation (meaning s. 3, clause 3) cannot have any effect"; and that, the plaintiff being "entitled to sell the putni tenure in default of payment of rent unless there are words in the grant depriving him of that right," and there being in his opinion "no such words," he was entitled to sell the tenure on default in payment of revenue, notwithstanding the provision for a different remedy, viz., the forfeiture of the tenure.

In appeal, the High Court came to the conclusion that it was reasonably clear, upon the construction of the putni kabulyat, that the rent was Rs.6000, and that as regards Rs.40,156, the putnidar covenanted with the zemindar to pay that sum into the collectorate of the district, being the amount of the Government revenue, and in effect to indemnify the zemindar against any liability in respect of it. The Chief Justice said: "It would be straining the language of the deed to say that this sum was rent or was ever intended by the parties to be regarded as rent." And after referring to the portions of the putni kabulyat, which speak of the Rs.6000 per annum as rent, and which distinguish between Government revenue and rent, and pointing out that under the putni kabulyat the zemindar is expressly empowered to recover the putni rent and road, public work, and dak-cesses

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by sale under the provisions of the Regulation, he continued :
 "It is not possible upon this document to say that this sum of Rs.40,156 was rent. The zemindar might, if he had been so minded, and the parties had so agreed, have fixed the rent at Rs.6000, plus the Rs.40,156, but in lieu of that he would appear to have preferred to take a round sum of Rs.6000 for the rent, leaving it to the putnidar to pay the Government revenue. It may very well be that the defendant, when the bargain was made, may have declined to allow the whole sum to be treated as rent, having regard to the summary power of sale given by the Regulation in the event of its falling into arrear. This view is supported by the ekrar of August 15, 1893, by which the putnidar agreed to pay an additional rent Rs.1000, and in which ekrar reference is made to the putni of June, 1885, as having been taken on the condition of paying to you (the Maharajah) a putni jumma of Rs.6000 per year, and Rs.40,156 odd to the collectorate on account of the Government revenue. She then agreed to pay an extra Rs.1000 as rent for the putni, with the same provision as to the application of the Putni Regulation of 1819, as the original lease. Upon the construction of the lease this Rs.40,156 is not, in my opinion, rent, and not being rent, the plaintiff is not entitled to put in force the provisions of the Putni Regulation of 1819 in the event of its falling into arrear. . . ."

Cohen, K.C., and *W. C. Bonnerjee*, for the appellant, contended that the view of the Subordinate Judge was right, and that the judgment of the Chief Justice proceeded upon an incorrect appreciation of the terms of the Regulation VIII. of 1819 and of the Revenue Sale Law (Act XI. of 1859). Under the Act payment of Government revenue is the first charge on a zemindari, and the zemindar is primarily responsible for payment of the same. If the respondent had not undertaken to pay the revenue direct into the collectorate to suit the appellant's convenience, she would have been bound to pay it direct to him as part of the rent of the putni. Whether paid to the collectorate or to the appellant, it was in either case part of the rent due ; the payment to the collector was on behalf of the appellant, and the place and mode of payment did not alter the character of the debt

discharged, which was of rent and not of revenue, the respondent not being liable in any way for the latter. It was rent, moreover, as defined in s. 3 of the Bengal Tenancy Act, 1885 (No. VIII., Indian). Reference was made to s. 10 of that Act and to Regulation VIII. of 1819, s. 3 and s. 8, clause 1. Under s. 3, clause 3, Government revenue when unpaid is an arrear of rent within its meaning recoverable under the Regulation. The road cess returns filed by the respondent under Bengal Act (IX. of 1880) were referred to as shewing that she had included the amount of Government revenue in the rent payable by her. Reference was also made to *Assanulla Khan Bahadur v. Tirthabashini* (1); *Basanta Kumari Debya v. Ashutosh Chackerbutti*. (2)

Jardine, K.C., and *Phillips*, for the respondent, contended that the judgment of the High Court was right. On the true construction of the deeds of 1885 and 1893 the parties deliberately fixed the rent of the putni at Rs.6000 only, increased by the later document to Rs.7000. She undertook as a distinct stipulation to pay the Government revenue to the collector on behalf of the appellant. This sum was never payable to the landlord, and was therefore not rent in arrear (when unpaid), and was not therefore recoverable by sale of the putni under the provisions of Regulation VIII. of 1819, s. 8. The parties intentionally annexed to default in payment of the Government revenue a penalty, viz., forfeiture of the putni. This could not under s. 3, clause 3, of the Regulation be applied to default in payment of rent; for by annulling the tenure it would render the prescribed sale of it as a tenure impossible.

Bonnerjee replied.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal from a judgment and decree of the High Court at Calcutta, dated August 6, 1903, which set aside in part a previous decree of the Subordinate Judge of Hooghly. The appeal raises a question as to the construction of two putni kabulyats, read in connection with the Putni Regulation VIII. of 1819.

That Regulation, after describing the nature of a putni tenure,

(1) (1895) I. L. R. 22 Calc. 680, 683. (2) (1899) I. L. R. 27 Calc. 67.

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1905 clause 3:—

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“In case of an arrear occurring upon any tenure of the description alluded to in the first clause of this section, it shall not be liable to be cancelled for the same, but the tenure shall be brought to sale by public auction, and the holder of the tenure will be entitled to any excess in the proceeds of such sale beyond the amount of the arrear of rent due” and a summary method of sale was provided.

Prior to 1885 the defendant, now respondent, held certain properties of the plaintiff-appellant in putni tenure. In May, 1885, a fresh arrangement was made, in substitution for the old, the terms of which were embodied in a kabulyat, dated the 29th of that month, which said:—

“I take from you in putni the entire interests in the remaining mahals (i.e., eight annas of Mahomed Aminpur) by fixing the annual jumma at Rs.6000 on the conditions given below, and by way of security for payment of this jumma, I hypothecate to you the properties mentioned in Schedule No. 2.

“1. The annual jumma of this putni mahal is fixed at Rs.6000. I shall pay to you the same without any variation by four kists as mentioned in the schedule at your house by means of chalans, kist by kist, and shall take dakhilas bearing your seal for the same.

“2. Besides the said putni rent I take upon myself the duty of depositing into the collectorate of the said district, the Government revenue of Rs.40,156 14 annas 9½ pies fixed for the 8-anna share of the said Mahomed Aminpur. Agreeably to the same I shall pay into the collectorate of the said district the said amount of revenue, kist by kist, and shall produce before you at Calcutta the chalan for the same, bearing seal and signature (of the collectorate) two days before the last payment of the kist.”

Clause 3 provided for the payment of interest on any part of the putni rent of Rs.6000 in arrear.

“4. If I fail to produce before you after depositing the Government revenue in the collectorate the chalan

of the deposit of the money two days before the last payment of the kist you will be able to deposit in the collectorate the amount of revenue payable by me within the said two days' time; and on your paying into the collectorate the amount of Government revenue payable by me within the said two days' time, the putni contract, which is hereby made with you, i.e., between you and me, shall become null and void; and you will be able to take khas possession of this putni mahal; and you will realize by sale of my properties, &c., the amount of Government revenue deposited by you with interest and costs.

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"Besides the said putni rent I shall pay to you by four equal instalments, along with the putni rent, the amount of road cess and public works cess payable from my putni mahal," with interest in case of default.

"6. I shall pay with the putni rent at intervals of every six months, the amount of dak-cess that will be fixed for the said putni mahal from time to time," with interest in case of default.

Clause 8 dealt with certain maintenance charges upon the share held in putni, created by a former zemindar, as to which it was said:—

"These charges are left to be borne by me. That amount shall have no connection with the putni rent, and if I do not pay to the persons to whom the same may be due and you have to pay them the same, you shall also realize the said amount with the consequential damages that you may sustain by sale at auction of my properties, pledged by way of security for payment of the rent for the putni in question and of my other properties moveable and immoveable.

"9. If the aforesaid putni rent of Rs.6000 and road cess, public works cess, dak-cess and interest on every kind of money due should fall in arrears, you will be able to realize the whole amount due to you with costs by sale at auction of my said putni mahal, on instituting proceedings against me, on the occasion of each of the two six-monthly instalments in course of the year under the provisions of Regulation VIII. of 1819.

"10. If the whole amount due to you be not realized by the

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sale of my putni mahal, under Regulation VIII. of 1819, you will be able to realize the unrealized balance, on the amount of a defaulted kist by sale of the properties hypothecated and of my other properties, moveable or immoveable, on instituting a suit against me under the law in force for realization of arrears of rent."

On August 15, 1893, a new agreement was entered into which was embodied in an ekrar kabulyat of that date, by which the respondent agreed to pay a further sum of Rs.1000 a year for the putni holding to which the former kabulyat related.

In the fresh kabulyat it was said :—

"Having according to the said proposal agreed to pay an additional rent of Rs.1000 in respect of the putni which I took on the condition of paying to you, Maharaja, a putni jumma of Rs.6000 per year, and of Rs.40,156. 14 into the collectorate, year by year, kist by kist, as Government revenue for the said 8-anna share, I hereby promise and declare in writing, that from the present year I shall pay Rs.1000 in excess as jumma for my said putni taluk."

Before the kabulyat of May 29, 1885, the Bengal Tenancy Act (VIII. of 1885) was passed, and it came into operation later in the same year. That Act contained a definition of rent (s. 3) :—

"Rent means whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant."

This definition seems to express very clearly the meaning of the word "rent" as it would be understood without any statutory definition.

The respondent made default in payment of two kists of Government revenue and in some instalments of the Rs.7000 rent and cesses. In or before May, 1901, the appellant petitioned the Collector of Hooghly for sale of the putni, under the provisions of the Regulation, in order to recover the arrears due, including therein the amount of the Government revenue, as to which the respondent had made default, and which the appellant had been obliged to pay. On May 3, 1901, the respondent filed an objection to the petition, on the ground that the Government

revenue formed no part of the rent of the putni, and therefore was not recoverable under the Regulation, and the objection was sustained by the Collector.

On June 7, 1901, the appellant instituted the present suit in the Court of the Subordinate Judge. In his plaint he stated the facts and asked (1.) for a money decree; (2.) that the Court should construe the documents and declare which of the sums in arrear were to be taken as rent, for which the putni might be sold under the Regulation. The Subordinate Judge made the money decree as asked for, and declared, amongst other things, that the Government revenue payable by the putnidar was a part of the jumma of the putni and was recoverable as such by sale under the Regulation.

Against this decree the present respondent appealed to the High Court, and that Court set aside so much of the decree as contained the declaration above referred to. Against that decision of the High Court the present appeal has been brought.

Had the question turned entirely upon the kabulyat of 1885, the matter would, in their Lordships' opinion, have been clear. The payment by the putnidar of the Government revenue is no doubt a part of the consideration to be rendered by her for the enjoyment of the tenure, but it is not money payable to the landlord. Nor is it provided in that document that it is to be dealt with in the same manner as rent, as is provided in the case of cesses. And what is most significant of all, a special mode of enforcing the obligation to pay Government revenue is provided, namely the cancellation of the tenure in case of default; and that is the precise sanction which the law has forbidden by the terms of the Regulation in the case of rent.

But the argument for the appellant was based mainly on the second kabulyat, that of 1898. It was contended that the words "on the condition of paying to you a putni jumma of Rs.6000 per year, and of Rs.40,156 14. into the collectorate, year by year, kist by kist, as Government revenue for the said 8-anna share," had the effect of making the Government revenue a part of the jumma. But even if those words had been used of the new arrangement then being entered into, they would not, in their Lordships' opinion, have properly borne the construction

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contended for. But in fact those words form part of a mere recital of the arrangement previously existing, and the nature of that previous arrangement is properly to be ascertained from the kabulyat of 1885.

For these reasons their Lordships are of opinion that the contention of the appellant cannot be maintained. They will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs.

Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitor for respondent: *G. C. Farr.*

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MUNICIPAL OFFICER, ADEN DEFENDANT ;

AND

HAJEE ISMAIL HAJEE ALLANA AND } PLAINTIFFS
 OTHERS }

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Jurisdiction of High Court—Clause 13 of Charter of 1865—Superintendence over Resident's Court at Aden—Order removing Suit—Act II. of 1864.

Held, that under Act II. of 1864 (India) the Court of the Resident at Aden is subject to the superintendence of the High Court of Bombay, which, under clause 13 of its charter of 1865, has power to remove and try and determine as a Court of extraordinary original jurisdiction a suit concerning land in Aden brought in the Court of the Political Resident in that place.

APPEAL from an order of the Bombay High Court in its extraordinary original civil jurisdiction (July 7, 1903) making absolute a rule for the transfer of this suit from the Court of the Political Resident at Aden for trial and determination by the said High Court.

The order was made under clause 13 of the charter of 1865, which is set out in their Lordships' judgment.

Present: LORD MACNAGHTEN, SIR FORD NORTH, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

The appellant claimed the property in suit as mutawalli or manager of a musafirkhana, or place for the reception of Mahomedan pilgrims to Mecca. He sought a declaration of his title, and payment of an occupation rent during his dispossession with other relief.

The question decided in the appeal was whether the High Court had power to make the order of transfer; which depended upon whether the Court at Aden was subject to the superintendence of the High Court within the meaning of clause 13. The High Court held that it was so subject. "Act II. of 1864," it said, "was passed after the Charter Act of 1861 and after the original letters patent of 1862. Not only is it stated in the preamble of Act II. of 1864 that it is expedient to provide for the superintendence or revision of certain of the judgments and proceedings of the Resident at Aden by the High Court at Bombay, but the Act provides in s. 31 that the High Court of Bombay shall have power to make and issue general rules for regulating the practice and proceedings of the Court of the Resident, and also to frame forms, &c., all almost in the same language as is to be found in s. 15 of the Charter Act. It would seem therefore that the Legislature expressly intended that the High Court of Bombay should have superintendence over the Court of the Resident. No doubt the High Court of Bombay is not the 'High Court' at Aden for such purposes as are governed by the definition of the High Court in the General Clauses Act; for it is not the highest Court of Appeal. There is no appeal from decisions or orders, civil or criminal, of the Resident (ss. 8 and 29 of Act II. of 1864). But, nevertheless, the High Court may have superintendence over the Resident's Court; and it is clear from ss. 8 to 13 of the Act II. of 1864 that in certain cases a litigant in the Resident's Court has of right what is practically an appeal to the High Court."

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Cohen, K.C., and *Phillips*, for the appellant, contended that the High Court had not the power to make the order appealed from under clause 13 of its charter of 1865. The Resident's Court at Aden is not subject to the superintendence of the High Court within the meaning of the said clause 13 or of s. 15 of the Charter Act (24 & 25 Vict. c. 104). The said clause 13 is in the

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same terms as clause 13 of the charter of 1862. The words, "subject to its superintendence," appear also in clause 16 which was substituted for clause 15 of the earlier charter. The Resident's Court is governed by Act II. of 1864, as amended, at least in reference to its Small Cause Court jurisdiction conferred by s. 14, by s. 2, sub-s. 3, of Act IX. of 1887, which now replaces the Act XLII. of 1860 mentioned in s. 14: and see the preamble, ss. 8, 9, 10, 14, 31. It was contended that that Act did not confer any power of superintendence on the High Court beyond the limited power contained in that Act. Those limited powers fell short of superintendence within the meaning of the charter and the Charter Act. They referred to the Scheduled Districts Act (XIV. of 1874), which includes Aden, and to *In re Thompson*. (1)

Birdwood, for the respondents, was not heard.

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The reasons for the report were delivered by

LORD MACNAGHTEN. At the conclusion of the arguments in this case their Lordships intimated that they would humbly advise His Majesty to dismiss the appeal, and added that the costs of the appeal would be paid by the appellant. It only remains for their Lordships to state their reasons.

The suit in which the appeal was presented concerns land in Aden. It was brought, and properly brought, in the Court of the Political Resident there. The High Court of Judicature at Bombay has made an order for the transfer of the suit for trial and determination by the High Court itself.

The authority on which the High Court assumed to act is contained in clause 13 of the letters patent of 1865 for the High Court of Judicature for the Presidency of Bombay, which ordains that "the High Court of Judicature at Bombay shall have power to remove and to try and determine as a Court of extraordinary original jurisdiction any suit being or falling within the jurisdiction of any Court whether within or without the Presidency of Bombay, subject to its superintendence, when the said High Court shall think proper to do so, either on the agreement of the parties to that effect or for purposes of justices, the reasons for

so doing being recorded on the proceedings of the said High Court."

The High Court has duly recorded its reasons for the order of transfer. The propriety of the order is not disputed if there was power to make it. The only question, therefore, is whether the Court of the Resident at Aden is "subject to the superintendence" of the High Court of Bombay. To answer that question it is, in their Lordships' opinion, sufficient to refer to Act II. of 1864 of the Governor-General in Council. By that Act, subject to certain amendments contained in Act IX. of 1887, the administration of civil justice at Aden is now regulated. The preamble of the Act contains a recital to the effect that certain judgments and proceedings of the Resident at Aden are not subject to the superintendence or revision of any Court of justice except so far as they are subject to appeal to His Majesty in Council, and that it is expedient to provide for "the superintendence" or revision of such judgments and proceedings by the High Court at Bombay. No appeal is to lie from any decision or order of the Resident. But provision is made for a reference to the High Court at Bombay in a great number of cases, and in every case the Resident is bound to dispose of the matter before him conformably to the decision of the High Court. Then s. 31 declares that the High Court shall have power to make general rules for regulating the practice and proceedings of the Court of the Resident, and also to frame forms for every proceeding for which the High Court shall think it necessary that a form should be provided, for keeping all books, entries, and accounts to be kept by the officers, and for the preparation and submission of any statements to be prepared and submitted by the Court of the Resident, and from time to time to alter any such rule or form, provided that such rules and forms shall not be inconsistent with the provisions of the Act or any other law in force.

The learned counsel for the appellant, while admitting that the Court of the Resident was to a certain extent subject to the superintendence of the High Court of Bombay, contended that the superintendence, such as it was, was not so thorough or complete as to satisfy the requirements of clause 13 of the letters patent of 1865 when rightly understood. In support of this

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view they asked their Lordships to compare and contrast the language of clause 13 with the language of s. 15 of 24 & 25 Vict. c. 104, usually called "the Charter Act," and to notice in s. 15 the stress laid on the existence of appellate jurisdiction which ought, they said, to be imported into clause 13 of the letters patent, and, at the same time, to observe the omission from that clause of the power of transfer conferred by s. 15 of the Charter Act. The answer to this ingenious, though somewhat contradictory, argument is simple enough. The power of transfer contained in the Charter Act has nothing to do with the power of removal conferred by the letters patent, and the letters patent make superintendence, not appellate jurisdiction, the condition of the exercise of the power of removal which the High Court at Bombay has put in force.

Solicitor for appellant: *Solicitor, India Office.*

Solicitors for respondents: *Holman, Birdwood & Co.*

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JAWAHIR SINGH. PLAINTIFF;
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SOMESHAH DATT AND OTHERS. DEFENDANTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL
COMMISSIONER OF OUDH.

Mortgage—Construction—Usufructuary Clause controlled by the Context.

Where the prima facie meaning of one clause in a mortgage deed was that the mortgagee entering into possession accepts the profits in lieu of interest:—

Held, in a suit for redemption, that by the true construction of this clause it was qualified by other clauses which should be read in conjunction therewith and not rejected for inconsistency, and that the mortgagor was liable to make good the deficiency of profits, with compound interest on the amount thereof.

APPEAL from a Court of the Judicial Commissioners (June 15, 1903) modifying a decree of the Subordinate Judge of Sitapur (June 27, 1901).

* *Present*: LORD DAVEY, SIR FORD NORTH, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

The question decided was as to the construction of a mortgage deed dated October 27, 1888, the clauses of which are sufficiently set out in their Lordships' judgment. The appellant sued for redemption, contending that by the true construction of the deed the profits were to be taken by the mortgagee in possession in lieu of interest. The mortgagees contended that they were entitled to principal and compound interest as stipulated, subject to a liability to account for the profits realized by them while in possession.

Both the Courts below decided this question of construction in favour of the respondents.

W. C. Bonnerjee, for the appellant, contended that on the true construction of clause 6 of the mortgage deed no interest was due, for the receipt of rents was to be taken in lieu of interest. It was contended that clause 11 should not be read therewith, but should be rejected as being repugnant to and inconsistent with it. In any event compound interest should not be decreed, for the mortgagees never rendered any account from which it could be ascertained what was the amount of interest left unpaid.

De Gruyther, for the respondents, was not heard.

The judgment of their Lordships was delivered by

LORD DAVEY. In this case there has been a good deal of litigation in the Courts below, but Mr. Bonnerjee, in opening the appeal, has very fairly narrowed the points which he thought he could properly bring to the attention of the Board.

The appellant is the representative of a mortgagor who executed a mortgage so far back as October 27, 1888, and the suit was brought to redeem a portion of the mortgaged property in which the appellant is interested. The provisions of the mortgage deed are somewhat peculiar. It is a compound of an ordinary mortgage and a usufructuary mortgage. The mortgage is for three years (clause 2); the interest is to be at the rate of 1 rupee 3 annas per cent. per mensem (clause 3), and clause 4 is as follows :—

“In the event of non-payment of interest yearly, the mortgagee will have power either to realize the principal with interest through a Court or get a new deed charging the property executed

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in lieu of interest. If, as a mark of favour, the mortgagor lets the interest remain unrealized, then in such case the interest shall be added to the principal from the date of its becoming due and interest at the said rate will run on it, as if its original formed part of the principal and within the term or after it till the date of realization, this rate of interest and compound interest shall continue."

That provision very clearly makes the principal money payable with compound interest. Clause 6 then provides as follows :—

"After taking possession the mortgagee will be entitled to receive the net profits after paying the Government revenue and village expenses, &c., in lieu of interest and during the time of her possession the interest and profits shall be deemed equal."

If that clause stood alone it might possibly be construed as an ordinary usufructuary mortgage in which a mortgagee entering into possession accepts the profits in satisfaction of the interest. But that clause does not stand alone. There is a further clause (clause 11) which appears to their Lordships to qualify the prima facie meaning which might be attached to it. Clause 11 (so far as material for the present purpose) is to this effect :—

"If during the period of possession of the mortgagee, after depositing the Government revenue and defraying the village expenses, &c., the profits do not cover the amount of interest, we, the mortgagors, will make good the deficiency from our pockets in accordance with the accounts prepared by the agents of the mortgagee. If we cannot make good the deficiency we will pay it with interest at the rate mentioned above at the time of redemption."

The first point taken is that that clause is inconsistent with clause 6. Their Lordships agree with the Court below in their inability to find anything inconsistent between the two clauses. Clause 11 no doubt qualifies what would be the prima facie meaning of clause 6; but they are perfectly capable of being read together.

The second point is that the deficiency of the interest which the mortgagor undertook to pay by clause 11 does not carry compound interest. There again their Lordships agree with the Court of the Judicial Commissioner. Reading the whole deed

together there can be no doubt that compound interest should be paid. In the first place this deficiency of interest is precisely such interest as is mentioned in clause 4, where it says: "If, as a mark of favour, the mortgagor lets the interest remain unrealized." There is nothing in clause 11 to take away the express provision contained in clause 4 with regard to interest which remains unrealized, and the words "We will pay it with interest at the rate mentioned above at the time of redemption," must, in their Lordships' opinion, be taken to be only a concise way of bringing in the application of clause 6 to the interest which the profits are insufficient to pay. This is made clearer by clause 7, which provides that the villages are to be redeemed when "the whole of the principal, interest, compound interest, and all dues against the tenants are paid in a lump sum."

Their Lordships see no reason, therefore, for differing from the conclusions at which the learned judges in the Court of the Judicial Commissioner have arrived, or from the reasons which are expressed in their judgment. They will, therefore, humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs of those respondents who appeared in the appeal.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for first two respondents: *Barrow, Rogers & Nevill.*

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ON APPEAL FROM THE HIGH COURT AT MADRAS.

Service Tenures—Grantees willing to perform them—Lands not liable to Resumption.

A zemindar has no right to resume grants of land which have been made subject to a burden of service, so long as the grantees or holders are willing and able to perform the services incident to their tenure, whether they are required or not.

Rajah Leelanund Singh v. Thakoor Munoorunjun Singh, (1873) L. R. Ind. Ap. Supp. Vol. 181, followed.

Upon an issue of fact whether a grant was on a service tenure or in lieu of wages it appeared that no designated office was conferred, but an obligation of a feudal character was imposed, that when services were exacted they were paid for in money, that a uniform rent had been paid for 120 years without alteration, that the lands had descended by inheritance, in either case without any claim of interference, and that there had been no instance of an attempt to resume :—

Held, that it was established that the lands were held on a fixed tenure, and were not resumable.

APPEAL from a decree of the High Court (September 9, 1902) reversing a decree of the Subordinate Court of Kishna (March 27, 1900).

The suit was brought by the appellant against the first respondent, the Zemindar of Telaprole, and a ward of the Court of Wards, and sixteen other defendants, to recover possession of the village of Hanumantunigudem, together with mesne profits.

The village in question formed part of the ancient Zemindari of Nuzvid (the history of which appears in the judgment of the Judicial Committee of the Privy Council in *Venkata Narasimha v. Narayya* (1)), and it was granted by one of the zemindars to

* *Present* : LORD DAVEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

the ancestors of the sixteen respondents. Subsequently (viz., in 1788) the zemindari was confiscated by Government on account of the rebellion of Narayya, the then zemindar. Having been granted in the following year to his eldest son, it was again resumed by Government for arrears of revenue in 1798, and in 1802 two zemindaris were carved out of it. One of these, which retained the name of Nuzvid (or the six Pergunnas of Nuzvid), was granted to Ramachandra, the second son of Narayya the rebel, and he received in respect of it a sanad in the ordinary form under Regulation XXV. of 1802. This document was dated December 8, 1802; and in the list attached to it the village in suit was mentioned among mokhasa villages. Ramachandra was succeeded by his son and then by his grandson, on whose death a suit was instituted, which resulted in the partition of the estate among his six sons, in accordance with the judgment of the Judicial Committee above referred to. The partition under the decree was finally carried out in January and February, 1882. The appellant, and the father of the first respondent, who were among the parties to that suit and who were brothers, were each put into possession of a one-sixth share of the estate. The village in suit is within the ambit of the appellant's share.

In 1894 the appellant sent a notice to the mokhasadars stating that he no longer required their services, and demanding to resume the service mokhasas; and on March 20, 1899, sued for possession and mesne profits.

The plaint alleged that the ancestors of the mokhasadars became servants of the Zemindar of Nuzvid, "each nayak undertaking to be present with fourteen peons, to be on attendance and keep watch, to have the crops reaped and the heaps threshed, and to keep watch over the heaps, to watch the sources of irrigation, and to accompany the zemindar when he goes a hunting, carrying spears, muskets, and other weapons, and to render such services"; and that, "in lieu of paying salaries to the ancestors of the mokhasadars for the rendering of the said services, the village called Hanumantunigudem, attached to the zemindari of Nuzvid was granted to them as a service mokhasa subject to the payment of kattubadi at the rate of Rs.144 per annum to the zemindar; and that the ancestors

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of defendants 2—17 (the mokhasadars), and subsequently, until some time ago, the major number of the defendants, were rendering service in the said manner.” It further stated that the appellant became entitled to the village on the partition of the Nuzvid estate; that the services were rendered irregularly for some time, and ceased about four years before suit, and that the plaintiff does not desire that they should be rendered in future, but it was not stated that they were on any occasion refused.

The first respondent, who held the village under leases from the mokhasadars, denied that the village was granted under the condition or for the purpose alleged, and in particular that the grant was made in lieu of wages for the services mentioned; and also denied that it was resumable or had ever been resumed. He pleaded that the village had been in possession of the ancestors of the mokhasadars long before the permanent settlement as an inam subject to the payment of kattubadi of Rs.144, and had since been held and enjoyed by them and their descendants.

The Subordinate Judge decreed in favour of the appellant. He held that the village had been granted on account or in lieu of wages for services to be rendered by the grantees.

The High Court held on the evidence that the village was granted by the zemindar in perpetuity, though subject to a burden of service, and that the grant was not made simply as payment for the services in lieu of money; and accordingly that the plaintiff was not entitled to resume it.

C. W. Arathoon (W. C. Bonnerjee with him), for the appellant, contended that upon the evidence the village was resumable at his option, having regard to the nature of the tenure. It was held in lieu of wages for services to be rendered, and the zemindar was entitled to dispense with the services and resume the village. He cited *Koolodeep Narain Singh v. Mahaheo Singh* (1); *Forbes v. Meer Mahomed* (2); *Radha Pershad Singh v. Budhu Dashad* (3); *Mahadevi v. Vikrama* (4); *Sanniyasi Razu v. Zemindar*

(1) (1866) 6 S. W. R. 199.

(3) (1895) Ind. L. R. 22 Calc. 940.

(2) (1870) 13 Moo. Ind. Ap. 438,

(4) (1891) Ind. L. R. 14 Madr. 365.

of *Sahu* (1); *Kooldeep Narain Singh v. Government of India*. (2) This was a grant for personal services to the zemindar, who can dispense with them and resume: see *Joykishen Mookerjee v. Collector of East Burdwan* (3), and the definition of mokhasa grants in Wilson's Glossary; *Narasayya v. Venkatagiri* (4); *Neelanund Singh v. Surwan Singh*. (5)

Cohen, K.C., and *Kenworthy Brown*, for the first respondent, contended that the High Court rightly held that the village was not resumable at pleasure. The evidence shewed that the village had been uninterruptedly in the family of the original grantee, passing by succession from father to son without objection by the zemindar. Also that there had been no resumption or attempt at resumption of the grant until 1894; that quit rent, or kattubadi, had been paid at the favourable rate of Rs.144 without variation. The mokhasadars had always performed the services incident to their tenure, and were still able and willing to render them. It was not held by right of any office conferred upon the original grantee in such way as to be annexed to the office; the grant was of the tenure reserving the services which had never been refused. Under these circumstances, the appellant had shewn no right to resume it. They referred to *Forbes v. Meer Mahomed* (6); *Kooldeep Narain Singh v. Government of India* (2); *Rajah Leelanund Singh v. Thakoor Munoorunjun Singh* (7); and Fifth Report of Select Committee on the affairs of the East India Company, Madr. ed. vol. 2, p. 4. Adverse possession for fourteen years (1882—1896) was a bar to the suit: see *Secretary of State for India v. Krishnamoni Gupta*. (8)

Arathoon replied.

The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. The Zemindari of Nuzvid, in the Madras Presidency, after protracted litigation, into the history

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(1) (1883) Ind. L. R. 7 Madr. 268.
(2) (1871) 14 Moo. Ind. Ap. 247,
255, 257.

(3) (1864) 10 Moo. Ind. Ap. 16, 45;
and see (1858) 7 Moo. Ind. Ap. 128,
132.

(4) (1899) Ind. L. R. 23 Madr. 262.

(5) (1866) 5 S. W. R. 292.

(6) 13 Moo. Ind. Ap. 438.

(7) L. R. Ind. Ap. Supp. Vol. 181.

(8) (1902) L. R. 29 Ind. Ap. 104.

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of which it is unnecessary to enter, was partitioned in the year 1882. At the partition a sixth share of the estate was allotted to the plaintiff and appellant, including the village of Hanumantunigudem, which is the subject of the present proceedings. Prior to the partition, the father of the first respondent had obtained from the other sixteen respondents or their predecessors in title, whom it will be convenient to designate as the mokhasadars, leases for thirty years of the lands held by them in the village under mokhasa tenure, and the term of these leases is still unexpired. The appellant claims that the leases are invalid, and that he is entitled to resume the village. The Subordinate Judge decided in his favour, but the High Court, on appeal, reversed the decision. The sole question which their Lordships now have to determine is whether, having regard to the nature of the tenure, the village is resumable at the option of the appellant, the zemindar.

There is no doubt that Hanumantunigudem is what is known as a mokhasa village. The learned judges of the High Court say that "Mokhasa is a well-known tenure in the Northern Circars; and the term itself implies that it is a tenure subject to service." In Wilson's Glossary, mukhasa or mokhasa is said to be irregularly derived from an Arabic word signifying "to have as one's own," and is defined as "a village or land assigned to an individual, either rent free or at a low quit rent, on condition of service." There is no deed or sanad containing the particulars of the grant in this case, but the evidence shews that the village has been held by the mokhasadars and their ancestors on a quit rent of Rs.144 per annum from a period antecedent to the introduction of the British Government, and that the service to be rendered was that of one naik and fourteen peons, whose duty it was to guard the zemindar's fort and treasury, to watch over the reaping and threshing of the crops, and to attend the zemindar on his hunting or military expeditions. These services, it is clear from a report of the Inam Commission, were rendered down to 1860, when a mokhasadar represented that, "in consequence of the proximity of his village to Nuzvid, the call for their service was incessant"; and the obligation is recognized in the leases granted to the

first respondent's father by the mokhasadars in 1881 in which there is a stipulation that they shall "render service to the zemindar according to custom." There has, therefore, been no breach of this condition on the part of the respondents. Both Courts in India agree in holding that "the mokhasadars hold their lands conditional upon the performance of the services," which have been already specified.

The question remains whether the zemindar can dispense with the services and resume the land; and upon this point the Courts below differed. The Subordinate Judge held that "in the absence of any evidence . . . as to an absolute grant, or as to a gift burdened only with a condition of service, the only conclusion that can be come to upon the evidence in the case is that the village was granted by the zemindar before 1780 to an ancestor of the (mokhasadar defendants), for the purpose of rendering the services above mentioned"; and he found upon a specific issue that the grant was in lieu of wages.

The learned judges of the High Court came to an opposite conclusion upon the facts. "In the first place," they say, "no office by any particular designation was conferred upon the original grantee, but an obligation of a feudal character was imposed upon him. He was simply to provide a specified number of men as custodians, so to speak, of the zemindar's property, and their services appear to have been rendered intermittently and not continuously. Besides, they were paid in money when they actually performed such services . . . that is to say, batta was given to them when actually on duty. It is also certain that in later years their services were not in frequent requisition, because, as Mr. Taylor points out in his report, the zemindar would have had to pay in the shape of batta more than the services were worth. In the second place, the following circumstances indicated as plainly as possible a fixity of tenure. The mokhasadars have paid a uniform rent of Rs.144 a year for the last 120 years without alteration at any time, and the land has descended from father to son hereditarily. There has been no instance of resumption or even an attempt at resumption during all this time. There has also been no attempt

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to enhance or to alter the rent, or to interfere with the devolution of the property from heir to heir."

Without altogether adopting the further reasons adduced by the learned judges in support of their view, their Lordships are of opinion that the considerations above stated are sufficient to establish that the grant in this case was a grant subject to a burden of service, and was not a mere grant in lieu of wages. This disposes of the case, for it is well settled that where lands are held upon such a grant, "as long as the holders of those grants are willing and able to perform the services, the zemindar has no right to put an end to the tenure whether the services are required or not": *Rajah Leelanund Singh v. Thakoor Munoorunjun Singh*. (1)

Great stress was laid in the Courts below upon a statement contained in a note to an "Abstract of the Revenue Collections in the Noozed Zemindari," prepared by the Circuit Committee in 1786, in which it is stated that "the mockawsaw villages and grants being immediately under the zemindar, and given or resumed when he pleases, are included in Government collections." The Circuit Committee was appointed by the Government "to inquire into the state of the Northern Circars," with a view, inter alia, to the settlement of the revenue, and their Lordships would have been disposed to attach importance to this piece of contemporary evidence as to the relations between the mokhasadars and the zemindar, were it not that it appears from the Fifth Report of the Select Committee on the affairs of the East India Company (vol. 2, p. 4 of the Madras edition) that "few of the members of (the Circuit Committee) appear to have been acquainted with the native languages, and, as it is stated by themselves, they depended wholly for what intelligence they obtained on those subjects, on the zemindars and the native officers in the villages, the very persons most interested to conceal the truth, and to impose upon them false information." Their Lordships agree with the learned judges of the High Court that although the records of the Circuit Committee may be good evidence with reference to the system upon which the Government claimed to deal with the zemindar's property, they

(1) L. R. Ind. Ap. Supp. Vol. 181, at p. 185.

cannot affect the rights of the mokhasadars as against the zemindar, with regard to which no independent inquiry appears to have been made.

Upon these considerations, their Lordships will humbly advise His Majesty that the decree of the High Court of Madras ought to be confirmed, and this appeal dismissed. The appellant will pay the costs of the first respondent who alone defended the appeal.

Solicitors for the appellant: *J. L. Wilson & Co.*

Solicitor for the first respondent: *Solicitor, India Office.*

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RANI SATRUPA KUNWAR DEFENDANT.

Nov. 22.

ON APPEAL FROM THE COURT OF THE JUDICIAL
COMMISSIONER OF OUDH.

Practice—Concurrent Findings of Fact—Act 1 of 1869, s. 22 (4.)—Treated in all respects as a Son.

Concurrent findings of fact that the appellant had not been treated in all respects by his maternal grandfather as his own son, within the meaning of s. 22 (4.) of Act 1 of 1869; and that, according to the custom of the family, a daughter's son does not succeed to the property of his maternal grandfather, will not be disturbed.

Umrao Begam v. Irshad Husain, (1894) L. R. 21 Ind. Ap. 163, followed.

APPEAL from a decree of the above Court (March 2, 1900) affirming a decree of the Additional Civil Judge of Lucknow (July 3, 1877), and dismissing the appellant's suit.

There were three questions dealt with by the Court below, viz. : (a) whether the suit was instituted within three years from the appellant's majority; (b) whether he was entitled to the taluqdari and jagir estate under clause 4 of s. 22 of the Oudh Estates Act, 1869, as having been treated by his maternal grand-

* *Present*: LORD MACNAGHTEN, SIR FORD NORTH, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON,

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father (the Rajah) in all respects as his own son ; and (c) whether he was excluded by custom governing the families of Katyar Thakurs, of which the Rajah was the head, from inheriting the non-taluqdari portion of the estate if it did not follow the devolution of the taluqdari portion. The Additional Civil Judge found (a) and (b) in the negative and (c) in the affirmative. The Court of the Judicial Commissioner differed from him as regards (a), but affirmed his findings as to (b) and (c), and in the result the appellant's suit was dismissed by both the Courts in India.

In granting leave to appeal to His Majesty in Council, the Court considered that, inasmuch as it had not affirmed the Additional Civil Judge on point (a), its decree could not be said to affirm the decision of the Court below: see *Rajah Tasadduq Rasul v. Manik Chand* (1) ; but it certified that there were substantial questions of law.

De Gruyther, for the appellant, after contending that the suit was barred by limitation, cited *Umrao Begam v. Irshad Husain* (2) as to the concurrent findings of fact.

Haldane, K.C., and *W. C. Bonnerjee*, for the respondent, were not heard.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. In their Lordships' opinion this case is concluded by the concurrent findings of the Additional Civil Judge of Lucknow and the Judicial Commissioners. Both Courts have gone into the case with minute care, and their Lordships consider that the issues of fact have been disposed of in a very satisfactory manner. Both Courts have found that the appellant, who was the plaintiff in the Court below, was not treated in all respects by Hardeo Bakhsh as his own son, and therefore was not entitled to the statutory right of succession under clause 4 of s. 22 of Act 1 of 1869. It has also been found that, according to the custom of the family, a daughter's son does not succeed to the property of his maternal grandfather.

Those findings are sufficient to dispose of the appeal ; but it may not be out of place to repeat what was laid down in the

(1) (1902) L. R. 30 Ind. Ap. 35.

(2) L. R. 21 Ind. Ap. 163, 166.

case of *Umrao Begam v. Irshad Husain* (1), to which Mr. De Gruyther has called their Lordships' attention. The question, said Lord Hobhouse in delivering the judgment of the Board in that case, "is not only a question of fact, but it is one which embraces a great number of facts whose significance is best appreciated by those who are most familiar with Indian manners and customs. Their Lordships would be specially unwilling in such a case to depart from the general rule, which forbids a fresh examination of facts for the purpose of disturbing concurrent findings by the lower Courts."

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs of the appeal.

Solicitors for appellant: *Watkins & Lempriere*.

Solicitors for respondent: *T. L. Wilson & Co.*

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MUTSADDI LAL AND ANOTHER PLAINTIFFS;

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KUNDAN LAL DEFENDANT.

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1906
Feb. 14.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Hindu Law of Adoption—Husband's authority to his Widow to adopt—Rights and Duties of Widow.

All the schools of Hindu law recognize the right of the widow to adopt with her husband's authority, which may be given either orally or in writing, and when given must be strictly pursued. She cannot, however, be compelled to act upon it unless and until she chooses to do so, and in the absence of express direction to the contrary there is no limit to the time within which she may exercise the power conferred upon her.

Case in which upon oral evidence, in reference to which the Courts below differed, their Lordships found that the authority to adopt was given and strictly pursued.

APPEAL from a decree of the High Court (January 23, 1902) reversing a decree of the Subordinate Judge of Saharunpur

* *Present*: LORD MACNAGHTEN, SIR FORD NORTH, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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—

(June 17, 1898). The plaintiff Balmakund was predecessor in title to the appellants and sued under the circumstances stated in their Lordships' judgment for a decree declaring that the respondent Kundan Lal was not the adopted son of Badri Das, deceased, and that a deed executed by his widow on August 28, 1894, in which she stated that she had legally adopted the respondent in the previous May, was null and void as against the plaintiff, and for consequential relief. The respondent pleaded that the widow according to the custom of the husband's family inherited his estate absolutely, and was by the custom competent to adopt without her husband's authority; but that she had obtained that authority and had validly adopted the respondent.

The First Court substantially decreed the suit, but the High Court dismissed it on the ground that the authority to adopt had been amply proved and that the adoption was valid.

Ross, for the appellants, contended that the authority to adopt was not proved, and that without that proof there could not be a valid adoption. If the evidence was sufficient to prove it, it was not strictly followed, and in consequence the adoption was *ultra vires* and invalid.

C. W. Arathoon, for the respondent, was not heard.

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—

The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. The suit which gives occasion to this appeal was brought by one Balmakund, claiming to be the reversionary heir of one Badri Das, deceased, against Mussamat Jamna, the widow of Badri Das, and Kundan Lal, the present respondent, whom she was alleged to have illegally adopted after her husband's death. Balmakund and Jamna have both died since the institution of the suit. The present appellants are Balmakund's representatives, and the whole question between them and the surviving respondent is whether the adoption of the latter by Mussamat Jamna was a valid adoption.

Badri Das was one of a family of Marwari Banias from Jaisulmere, who had settled at Jalalabad, in the Saharunpur district of the United Provinces, where he died childless on October 27, 1888. After his death, his widow entered into possession of his

property, in which she had, at all events, a life estate. On August 17, 1891, she executed a deed of sale of a village which had been purchased with money left by her deceased husband; and three years later, on August 14, 1894, Balmakund filed a suit in the Court of the Munsif of Kairana for a declaration of his rights as reversioner against Mussamat Jamna and the purchasers of the village. Prior to the institution of this suit, on May 12, 1894, the widow adopted the present respondent, and on August 28, 1894, she executed a deed confirming the adoption. The Munsif held the adoption valid, and dismissed Balmakund's suit on August 15, 1895. This decision was upheld on appeal by the Subordinate Judge of Saharunpur. Balmakund thereupon brought the present suit to set aside the adoption.

An attempt was made, in the early stages of the suit, to set up a custom among the Marwari Banias of Jaisulmere, under which the power of widows in regard to adoption was greatly extended; but the attempt failed, and the Subordinate Judge held that the case was governed by the Mitakshara law. This is probably true, but the High Court pronounced no decision upon this point, and it is unnecessary for their Lordships to determine it. All the schools of Hindu law recognize the right of the widow to adopt a son to her husband "with the assent of her lord." It is equally well established that this assent may be given either orally or in writing; that, when given, it must be strictly pursued; that she cannot be compelled to act upon it unless and until she chooses to do so; and that, in the absence of express direction to the contrary, there is no limit to the time within which she may exercise the power conferred upon her.

In the present case both Courts below held the fact of the adoption proved, but they differed upon the question whether the widow had been authorized by her husband to adopt. The learned Subordinate Judge did not believe the witnesses. "They not only," he says, "contradict each other on material points, but have made improbable and false statements, and at least" (three of them) "are partial to the defendant, and their evidence cannot be considered to be as good as that of independent and disinterested witnesses." The learned judges of the High Court, on the other hand, say:—

"We are wholly unable to agree with the learned Subordinate

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Judge in rejecting the evidence adduced to establish this fact. On the contrary, we think that the evidence is worthy of credit, and amply sufficient to justify a finding in favour of the appellant. Not merely is it ample in itself, but it is supported by the probabilities of the case, and under these circumstances we find the authority to adopt has been proved."

Their Lordships have had the difficult task of deciding between these conflicting opinions, without having seen or heard the witnesses, and without the assistance which is not unfrequently derived from documentary evidence. It is worthy of notice, however, that the story told in this suit is the same as that told in the suit before the Munsif of Kairana one or two years previously; and that in the meantime the appellants had ample opportunity to test its accuracy; but they produced no evidence in rebuttal, and were unable materially to shake the witnesses for the respondent on cross-examination. Mussamat Jamna had died before she could be examined in this suit; but her statement made in the previous suit in the Munsif's Court was put in evidence. What she says is this:—"Six or seven days before his death Badri Das told me in the forenoon to adopt a boy. . . . He did not mention any boy, but said, 'Adopt whomsoever you may like. Adopt the boy of the man of Sirsawa only.'" The Sirsawa man was one Hardeo Das, a friend and caste-fellow of Badri Das, one of whose sons was ultimately adopted by her. Further on she says:—

"Badri Das gave authority to adopt during his illness. He had been ill for three months, and when he told me to adopt a son, he perhaps had no hope of his life. It was in the three-arched room facing the east, and forming part of this house that he told me to adopt a boy. I and my three sisters-in-law (husband's sisters) were there at that time. . . . These three sisters-in-law are now dead." And later on, she says:—"Badri Das told me to adopt a boy within a year or two, *i.e.*, at any time I liked after his death."

The statement of the widow is corroborated by three witnesses, Chiranji, a brother-in-law of her husband; Baldeo Das, her own brother; and Chhajju Mal, her nephew. All three appear to have been frequently with Badri Das during his last illness, and all concur that he authorized her to adopt one of the sons of

Hardeo Das of Sirsawa; but none say that he named the boy to be adopted, or the time within which the adoption was to be made. It is true that two of these witnesses belonged to the widow's family; and it was matter of just observation by the learned counsel for the appellant that Hardeo Das, the father of the boy adopted, who is said to have been present also when the authority to adopt was given, was not called. But the evidence forthcoming in cases of this character is seldom entirely complete or satisfactory. Here, so far as it goes, it is all on one side; and their Lordships see no good reason for discrediting it altogether. They accordingly concur with the opinion of the learned judges of the High Court on this point.

But, it was argued, assuming the authority to adopt to have been given, it was not "strictly pursued." The direction to adopt one of the sons of Hardeo Das must, it was urged, be taken to mean one of the sons of Hardeo Das then living; and the boy adopted was not then born. The direction was also to adopt "within a year or two"; and the adoption was in fact not made until about six years after the death of Badri Das. Their Lordships are not disposed to place so narrow a construction upon the words said to have been used by Badri Das. Hardeo Das had at that time four sons, but no one of them was specially named, and all the dying man apparently desired was that one of this particular family should be selected; and their Lordships consider that the direction was sufficiently complied with by the adoption of the respondent, who was of a more suitable age for affiliation than his elder brothers. As regards the period within which the adoption was to be made, the widow expressly says that the words "within a year or two" were qualified by the further words "at any time I liked," and these are wide enough to cover the period which actually elapsed before the adoption was made.

Upon a review of the whole case their Lordships will humbly advise His Majesty that the decree of the High Court ought to be confirmed and the appeal dismissed. The appellants will pay the costs of the appeal.

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Solicitors for appellants: *Barrow, Rogers & Nevill.*

Solicitors for respondent: *T. L. Wilson & Co.*

with mesne profits from Magh, 1808 B.S., the date of the dis-possession of her share. Down to that date the appellant alleged there had been joint possession and enjoyment thereof, the appellant being entitled to a one-third and the respondents to a two-thirds share, the parties being governed by the Hindu Law of the Bengal School.

The respondents denied the widow's possession after her husband's death and pleaded limitation, which was overruled by a concurrent finding of fact as to the appellant's possession within the statutable period. They also set up the will in suit.

The Subordinate Judge held that the suit was not barred by limitation; and that it was not satisfactorily proved that the will was genuine. With regard to its registration the Subordinate Judge commented upon its purporting to have been effected at the office "and not by a commission issued, although the testator was so weak that he did not survive even twenty-four hours"; also upon "the general reputation of character which the two identifiers in the registration office enjoyed." No circumstances, he remarked, were deposed to which rendered it probable that Brojo Nath was capable of going to the registration office and of personally admitting his execution of a will.

The High Court also held that the suit was not barred, giving the appellant the benefit of the doubt as to her continued joint possession. They pointed out that as the Hindu Wills Act, 1870, had not been enacted at the time of the death of Brojo Nath Chowdhry no probate could be obtained of the will, that it had been acted upon in the matter of granting a putni, that the conduct of the parties had been throughout consistent with its provisions, and that it was well proved, particularly as it had been registered by the Collector at the instance of Brojo Nath Chowdhry himself.

Cowell, for the appellant, contended that the First Court was right in finding on the evidence that the will was not proved to have been duly executed, and that it was incredible that Brojo Nath had attended at the registration office in less than twenty-four hours before his death from fever and phthisis. There were concurrent findings that the will had not been acted upon, except

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that it was recited on one occasion in a conveyance, and that joint possession had been continued for thirty years regardless of its provisions. The onus probandi was on the respondents to give some credible and probable account of the circumstances surrounding the execution and registration of the will, and as far as possible of the execution itself. Reference was made to s. 28 of Act XV. of 1877 and arts. 142 and 144, *Vasudeva Padhi Khadanga Garu v. Maguni Devan Bakshi Mahapatrulu Garu* (1) and *Gossain Dass Chunder v. Issur Chundernath* (2), on s. 29 of Act IX. of 1871.

Bonnerjee, for the respondents, contended that the will was shewn to have been acted upon in the matter of the appellant's annuity. The appellant as a widow was not entitled to separate maintenance so long as she remained in joint possession. No probate could be obtained of the will before the Hindu Wills Act of 1870, and probate was not compellable under the Probate and Administration Act, 1881. The appellant was not in receipt of her third of the joint income, but only of the allowance under the will augmented by consent. There was no evidence of personation before the Registrar, and no motive shewn for a gross fraud.

Cowell replied.

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The judgment of their Lordships was delivered by

SIR FORD NORTH. The only question to be decided on this appeal is, whether the appellant's husband, Brojo Nath Chowdhry, who died on April 23, 1867, died intestate, as the appellant alleges, or left a will, as the respondents contend. If he did make that will, the appellant is out of Court. The Subordinate Judge of Rajshahye decided in the appellant's favour, holding that the will was a forgery; but the High Court of Judicature at Fort William reversed that decision, and dismissed the appellant's suit, with costs.

Hari Nath Chowdhry, who married Raj Lakhi Debi, and died many years before 1867, left three sons, who succeeded to their father's property, viz., Brojo Nath Chowdhry, the appellant's husband; Mathura Nath Chowdhry, who died about 1870, and whose sons are the respondents on this appeal; and Jadab Nath

(1) (1901) L. R. 28 Ind. Ap. 81.

(2) (1877) Ind. L. R. 3 Calc. 224.

Chowdhry, who died before 1867, intestate and unmarried, whereupon his mother, Raj Lakhi Debi, succeeded to his share in the father's estate.

Brojo Nath Chowdhry resided at Sarippur or Kasimpur, in the district of Rajshahye; but some months before his death he removed to Nattore, on account of his health, and there he remained until he went to Rampura. There is no doubt that while at Nattore he was very ill, and ultimately his recovery was considered hopeless. While he was there a cousin and great friend of his named Girish Chunder Lahiri—who seems to have been in a superior station in life, and had received the title of Rai Bahadur—came over to Nattore, and took Brojo Nath Chowdhry back with him to his own house at Rampura, where he stayed till he died. The appellant and one of her witnesses say the death was only two days after the removal; while two witnesses for the respondents put it at five or six days and ten or twelve days respectively. The doctor also who was called in at Rampura says he attended him for five or six days, and he saw from the first that the case was hopeless. On the day before his death, according to the respondents' evidence, he went to the registry office, and there at 4 P.M. presented for registration the will in dispute. It bore his signature and seal, and was attested by five witnesses. Four of those witnesses died before the trial; but the fifth, the doctor of Brojo Nath Chowdhry, was called as a witness. The execution of the will was admitted by Brojo Nath Chowdhry, who was identified by two witnesses, and then the will was registered. Each of these four stages was verified by the signature of W. S. Wells, the Registrar. This was on April 22, 1867. The doctor says in his evidence that he signed this will in the presence of Brojo Nath Chowdhry, and at his request, after some discussion with him as to whether he should make a will or not. He thought he attended Brojo Nath Chowdhry for five or six days. He said that many other persons were present when he signed the will, but he did not know whether any other witness or the testator had signed when he did. He also said that many respectable people came in to see the testator during the time of his attendance. The Subordinate Judge declined to believe this witness because there was some

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doubt as to an apparent alteration in the date of his attestation of the will, and the explanation he gave was not clear. But this is not wonderful, as the event had happened thirty-one years before; and the High Court thought, and their Lordships think, that the reasons for not giving weight to the evidence of this witness are quite insufficient. They see no reason to doubt his veracity.

Another reason why the Subordinate Judge doubted the validity of the will was on the ground of the absence of any other respectable witnesses to it besides the doctor, and the probability that other persons were present who would have been more likely to be asked to attest it than the persons whose signatures were affixed to it. But there is not one word in the evidence affecting the respectability and competency of the four attesting witnesses, all of whom were dead before the trial.

Then the judge also stated that "the general reputation of character which the two identifiers in the registration office enjoyed" tended to throw a cloud of doubt upon the bona fides of the transaction. Such evidence of the general reputation of the character of those persons (who are both dead) ought not to have been admitted at all. But it was admitted, and is insufficient to prove what it was said to prove. It would be waste of time to discuss it. But that the signatures of the identifiers were their true signatures was clearly proved.

Then another circumstance relied upon by the learned judge was "the untimely hour of registration at the registration office . . . though the testator was so weak that he did not survive even twenty-four hours." The hour was 4 P.M., which *prima facie* is not unreasonable; and if the evidence of the appellant is to be believed her husband had taken a much longer journey (from Nattore to Rampura) on the previous day without apparently being any worse from it. The appellant also says that on the day in question many gentlemen of the town came in and saw her husband. Then Lakhi Nath Mazumdar, who was at the registry, says that he saw Brojo Nath Chowdhry arrive there in a palanquin to get the will registered, and saw him sign and seal the registration. A little further on he says that at the request of Brojo Nath Chowdhry he came to see him at Rampura four or

five days before his death ; that sometimes he was helped to sit up, and sometimes used to get and sit up himself unaided ; that on the morning of the next day he told him a will had been executed, and shewed him the will, but did not request him to be a witness ; that for two or three days before his death he could at times get up and sit up unaided, but from one day before his death he lost the power of getting and sitting up unaided. He was taken in a palanquin. The mukhtar Baboos helped him to sit up, and he sat up and admitted the will. Then Iswar Chandra Ghose says that on the day just preceding his death he saw him going out of his lodgings in a palki, with a view to go to the Court. This evidence would be quite sufficient, in their Lordships' opinion, to answer the observations of the Subordinate Judge. But they desire to put the case on a higher ground. The registration is a solemn act, to be performed in the presence of a competent official appointed to act as registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present and are competent to act, and are identified to his satisfaction ; and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order. Of course it may be shewn that a deliberate fraud upon him has been successfully committed ; but this can only be by very much stronger evidence than is forthcoming here. And this must be specially borne in mind, that no witness has been found who will say that the signature of Brojo Nath Chowdhry in the will and in the registrar's book is not in his handwriting. The contrary is expressly stated by Lakhi Nath Mazumdar, who adds that his signatures when in good health were better than these. The learned judge did not believe this witness ; nor that he was present at the time, upon the ground that if he had been he would probably have been invited to attest the will ; but this difficulty does not weigh much with their Lordships.

It is also suggested that Brojo Nath Chowdhry was presumably under the influence of his brother Mathura Nath Chowdhry, and was very possibly induced by him to make the will. This assumes, of course, that it was executed by him. But this suggestion was not raised by the pleadings, and is entirely

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unsupported by any evidence, and need not be further considered. The will does not seem unreasonable for a gentleman in the position of Brojo Nath Chowdhry, and has a genuine look about it. The testator says that, considering the smallness of his property, he does not wish to adopt a son, and vests his property in his brother Mathura, that he may perform all ceremonies and maintain his wife during her life, and his four unmarried daughters, and also give those daughters in marriage, and, if there was any difficulty about living together, the appellant was to have from Mathura an allowance of Rs.120 a year at the rate of Rs.10 a month for her maintenance, which allowance Mathura should get after the wife's death. He then added that he had married his eldest daughter, and she was to have Rs.48 a year for her maintenance at the rate of Rs.4 a month, and he provided that if Mathura did not pay the allowances and daughters' money then he charged them on his estate. Subject to the above the estate was to go to Mathura.

But it is said that the will was suppressed and never acted on. This also is not in accordance with the evidence. It has been proved that the allowance to the eldest daughter has always been paid; that the younger daughters have been provided for out of the estate on their marriages; and that the appellant also has been paid first Rs.10, afterwards Rs.15, and after that Rs.20 per month, the reason for the increase being that she complained that her allowance was not sufficient, and some increase should be made. The Subordinate Judge said that the will was wisely and prudently kept dark, and that the fact that the appellant was paid twice as much as she was entitled to under the will shewed that there was something rotten in the core of the will, and therefore precaution was taken that the appellant should have no occasion to dispute it. Their Lordships deprecate this suggestion as not supported by any of the proofs in the case; and have no doubt that the increase of allowance was made by Mathura at the suggestion of Girish Chandra Lahiri Rai Bahadur, for the reason above mentioned. Excluding the evidence of the appellant, which the High Court declined to accept as reliable, there is no evidence that the appellant ever claimed any share in the income of the estate.

Their Lordships are clearly of opinion that the decision of the High Court now appealed from was correct, and should be affirmed; and they will humbly advise His Majesty that this appeal should be dismissed.

The appellant must pay the costs of the appeal.

Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitor for respondents: *W. W. Box.*

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AND		
CHERAKUNNATH NAMBIYATHAN AND ANOTHER	} RESPONDENTS.	Feb. 15.

Ex parte VENGANAT SWAROOPATHIL.

Practice—Petition for Special Leave—Reasons of High Court for refusing Certificate.

Where a certificate for leave to appeal is refused by the High Court, it is desirable that the reasons should be stated.

THIS was a petition for special leave to appeal from two decrees of the High Court dated February 15, 1905, on the ground that substantial questions of law were involved, and the value of the subject-matter was over the appealable amount.

The High Court, on September 23, 1905, dismissed two applications for leave to appeal therefrom without giving any reasons.

De Gruyther, for the petitioner.

The judgment of their Lordships was delivered by

LORD DAVEY. Their Lordships do not think that this is a case in which they can advise His Majesty to grant special leave

* *Present* : LORD DAVEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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to appeal. Their Lordships desire to add that it would be convenient if the High Court, on future occasions, in refusing a certificate for leave to appeal, would be good enough to state the grounds on which they refused it.

Solicitors for the petitioner : *Lawford, Waterhouse & Lawford.*

CHAUDHRI MEHDI HASAN AND OTHERS . . PLAINTIFFS;

AND

MUHAMMAD HASAN DEFENDANT.

ON APPEAL FROM THE COURT OF THE JUDICIAL
COMMISSIONER OF OUDH, LUCKNOW.

Mahomedan Law—Deed of Gift—Possession—Consideration.

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By Mahomedan law the holder of property may aliene it by deed of gift, accompanied by delivery of the thing given, so far as it is capable of delivery; or by deed of gift coupled with consideration, in which case, although delivery of possession is unnecessary, yet actual payment of the consideration must be proved, and also a bona fide intention on the part of the donor to divest himself in præsentî of the property and to confer it on the donee.

In a suit to set aside a registered deed of gift purporting to be for consideration:—

Held, that on the evidence, it was proved that no consideration passed or was intended to pass; that the plaintiff did not intend to give the property to the defendant (except subject to a reservation expressed in the deed); that the deed was not followed by delivery of possession; and, consequently, that the deed was fictitious and void.

APPEAL from a decree of the Court of the Judicial Commissioner (July 31, 1899), reversing a decree of the Subordinate Judge of Barabanki (September 26, 1898), and dismissing the suit.

The question decided was whether a deed of gift executed under the circumstances stated in their Lordships' judgment by the plaintiff, Mehdi Hasan, in favour of the defendant, Muhammad Hasan, on July 23, 1886, was executed as a nominal

* *Present*: LORD MACNAGHTEN, SIR FORD NORTH, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

transaction not intended to have effect according to its purport, and whether the plaintiff was entitled to obtain cancellation of the same.

The suit was brought in 1897. The plaint alleged that the plaintiff, when he was going on a pilgrimage to Mecca, executed the deed of gift as a nominal transaction, and that both before and after its execution he had been in possession. The defendant pleaded that the deed of gift was made on account of natural love and affection, that it was intended to operate according to its purport, and that possession was delivered to the donee.

The Subordinate Judge found on the evidence that the deed of gift was fictitious, and was not intended to be acted upon during the lifetime of the executant.

In appeal the Court of the Judicial Commissioner agreed with the Subordinate Judge in finding that the consideration of Rs.2000 was not paid by the defendant, and that the probability was that it was not intended that any consideration should pass for the deed of gift.

Its conclusion was thus expressed :—

“Upon a review of the whole of the evidence, I am of opinion that the plaintiff has failed to prove that the deed of gift was a sham and fictitious transaction, that it was not intended that it should operate as a deed of gift, that it did not operate as a deed of gift, and that possession was not actually transferred under it to the donee.

“I find that in executing the deed of gift the plaintiff did intend to give his property to the donee; that the gift was followed by delivery of possession, and that effect was given to the instrument as a deed of gift by the plaintiff.

“The plaintiff having failed to establish that the deed of gift was fictitious and benami, his suit must be dismissed.”

Ross, for the appellants, contended that the evidence shewed that the deed of gift of July, 1886, was a nominal and fictitious transaction, which was executed by the plaintiff on his departure for Mecca subject to the understanding between him and the defendant that the latter should be in charge of the villages comprised therein during the plaintiff's absence and manage them

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J. C. on his behalf. The plaintiff did not go to Mecca till long afterwards, and although mutation of names was effected, the evidence shewed that the plaintiff never parted with actual possession, and the defendant never obtained proprietary possession nor paid any consideration money. He referred to *Ranee Khujoorroonissa v. Roushun Jehan*. (1)

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De Gruyther, for the respondent, contended that the evidence was in favour of a bona fide and genuine transfer of property. Consideration passed, the deed was registered, and mutation of names effected. The respondent had exercised acts of ownership over the property by executing mortgages and instituting suits. To all of those acts and to payment of Government revenue in the respondent's name the plaintiff consented. The plaintiff only enjoyed that portion of the property which the deed of gift reserved to him. He contended that actual possession had been given, and that therefore the finding that no consideration had passed was immaterial. He referred to *Meer Usdoollah v. Mussumat Beeby Imaman* (2); *Sajjad Ahmad Khan v. Kadri Begam* (3); *Nawab Umjad Ally Khan v. Mussumat Mohumdee Begum* (4); and Transfer of Property Act, c. 7, ss. 128, 129, the effect of which sections is that s. 128 does not apply to Mahomedans. Cases which have arisen amongst Hindus are collected in a note to s. 129: see Stokes, Anglo-Indian Codes, Vol. I. p. 812.

Ross replied.

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The judgment of their Lordships was delivered by

SIR FORD NORTH. This action was commenced in the year 1897 to have a deed dated July 23, 1886, and executed by the plaintiff, Chaudhri Mehdi Hasan, declared void and cancelled. The Subordinate Judge of Barabanki made a decree to that effect; but this was reversed, and the suit was dismissed, on appeal to the Court of the Judicial Commissioner of Oudh, on July 31, 1899.

Just before that appeal Mehdi Hasan (hereinafter referred to as the plaintiff) had sold part of his interest to two persons

(1) (1876) L. R. 3 Ind. Ap. 291,
305, 307.

(2) (1836) 1 Moo. Ind. Ap. 19.

(3) (1895) I. L. R. 18 Allah. 1.

(4) (1867) 11 Moo. Ind. Ap. 517,

547.

who, by an order of the Judicial Commissioner dated May 10, 1899, were joined as co-plaintiffs with him, and these three persons are now the appellants.

Chaudhri Nabi Bakhsh, who died many years ago, had three sons—Mehdi Hasan, the plaintiff; Hadi Hasan, who is still living, and whose son is the defendant Muhammad Hasan; and Razzak Bakhsh, who disappeared before 1880 and has not been heard of since. He left two children, Abdus-Sattar and Abdul Ghaffar.

At the date of the above-mentioned deed the plaintiff was the owner of one-third share in the villages of—(1.) Udaria, (2.) Chhilgawan, (3.) Akbarpur, (4.) Raushanabad, (5.) Sarawan, (6.) an under-proprietary holding and two houses in Nidura, and (7.) certain sir lands and groves of comparatively small value. He was also owner of the entirety of a house at Chhilgawan. The other two-thirds of the above-named properties (except the house at Chhilgawan) belonged respectively to Hadi Hasan, and to Abdus-Sattar and Abdul Ghaffar.

Of the above lots 1, 2, 4, and 5 were in the possession of mortgagees; and the rest (other than the house at Chhilgawan) were in the possession of the co-sharers.

By that deed the plaintiff stated that in lieu of Rs.2000 he had made a gift with consideration to the defendant and had received the money in full, and no portion thereof was due by the donee; that he had placed the donee in possession of the villages, but as he had no other property to live on he had set apart from the profits of Akbarpur the sum of Rs.164. 4 annas for necessary expenses so long as he and his wife should live, and after their deaths the defendant should have the property. Subject to a certain other small exception he gave the defendant all his proprietary rights in the gifted property.

Shortly afterwards the deed was registered, the plaintiff admitting its execution by him, and that he had before execution received the full sum of Rs.2000. Some little time afterwards mutation of names in favour of the defendant was made in the registers.

It is not in dispute that at the date of the deed the plaintiff and defendant were on friendly terms, and that a marriage (which

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came off about six months later) between the defendant and a daughter of a sister-in-law of the plaintiff was in consideration. At that time the plaintiff was contemplating a pilgrimage to Mecca, with his wife, and desired to provide for the management of his property by the defendant during his absence. There is voluminous and conflicting evidence as to the persons by whom, and circumstances under which, the deed was prepared, and how it attained its final shape; and it is impossible to go through the evidence in detail, there being upwards of 100 witnesses in the case. But stating their view shortly their Lordships consider it proved that in the first instance the plaintiff proposed to give the defendant a power of attorney to manage his property during his absence; that the defendant did not like this, and asked Muhammad Raza of Nidura, Razzak Bakhsh, Muhammad Raza of Atahra, and Sajid Ali, who were all friends of his, to try and persuade the plaintiff to make it a deed of gift, as this would be much better than a power of attorney: that they agreed to do so, and called upon the plaintiff accordingly, and endeavoured so to persuade him; that the plaintiff at first refused, but upon the defendant agreeing to pledge his oath that during the life of the plaintiff and his wife he would not in any way interfere with their possession, the plaintiff withdrew his objection; that the defendant then said that there should be some consideration in the deed; and on the plaintiff's objecting to this change the persons present to advise the plaintiff to do what the defendant wished joined in chorus, saying "Life is uncertain; as you are willing to execute a gift, why not execute hiba-bil-iwaz, because otherwise the gift would be considered to be collusive"; and that the plaintiff again yielded to their persuasion, and at their instance consented to a consideration being inserted. The defendant stated in his re-examination that the gift was made hiba-bil-iwaz because Asghar Ali suggested that it was necessary, so that it could not be impugned or challenged afterwards by any of the plaintiff's heirs and relations. And in his defence in this action he pleads that as the deed was made for a valuable consideration it could not be set aside.

The Judicial Commissioner of Oudh, who delivered the

judgment in the Appeal Court, said that he was not prepared to place reliance on the evidence of Razzak Bakhsh, Muhammad Raza of Nidura, Sajid Ali, and Muhammad Raza of Atahra. Razzak Bakhsh is in a somewhat different position from the others. There was a conflict of evidence as to whether the deed in question was drafted by Razzak Bakhsh; or was drafted by Asghar Ali, and fair copied by Razzak Bakhsh. The learned judge took the view that Asghar Ali was the draftsman, and disbelieved Razzak Bakhsh, although the Subordinate Judge held him to be a respectable witness who, in his opinion, had spoken the truth. But the Judicial Commissioner gave no reason for his refusal to believe the three others; and the Subordinate Judge saw all of them and believed them; and their Lordships do not see any reason for treating them as unworthy of credit. A power of attorney is a document frequently used in India; and they are of opinion that it is far more probable that the plaintiff first proposed a power of attorney, but was induced by the persuasion of the defendant's friends to go further and execute a deed, than that the plaintiff should voluntarily have proposed to give all his property (except a few rupees) out and out to the defendant.

Then the next matter for consideration is whether the deed is a deed for value, for which the consideration of Rs.2000 was paid, or is a deed for which no value was really given, a hiba-ism-farzi. Upon this issue the Subordinate Judge examined the evidence with great patience and care, and came to the conclusion that no valuable consideration had ever passed, and that the deed of gift was not for value and was fictitious.

The Judicial Commissioner said upon this point:—

“I agree with the lower Court in being of opinion that the consideration of Rs.2000 was not paid by the donee. The Subordinate Judge has given good reasons for his finding. I refer also to the evidence of the witness Ibad Ali. The probability is that it was not intended that any consideration should pass for the gift.”

At this stage it would be sufficient to say, in most cases, that there being concurrent findings in two Courts below on a question of fact, the matter must be treated as closed. But with a view to the subsequent part of the case, it is desirable to refer

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briefly to the mode in which this payment of the Rs.2000 was attempted to be supported. The defendant says that he paid this sum to the plaintiff, being the profits from tobacco cultivation during several years; that he paid it in May or June, one or two months before the deed was executed; Rs.1800 on one occasion, and Rs.200 within two months after; that Tajammul Husain Khan, Mata Din Singh, Chauhan, Sheikh Aulad Husain, Bakar Khan, and others were present; that the money was brought tied in a cloth by Bakridi and Mohun Pasi; that the money was paid to the plaintiff, the Rs.200 at 10 A.M., and the Rs.1800 at noon. Tajammul Husain says that he was present when Aulad Husain, Bakridi, and Mohun Pasi came with Rs.1800, and the defendant paid it to the plaintiff on account of a hiba-bil-iwaz; and that the plaintiff had executed the deed because of the regard and affection he had to the defendant, who had married his sister-in-law's daughter (which marriage, by the way, did not take place until six months later). Then Mata Din Singh says that he was present when the defendant arrived with Rs.1800, and put it down before the plaintiff; that the deed was being read at the time by Tajammul Husain; that Bakridi and a Pasi brought the money and placed it on the couch where the plaintiff was sitting, and the plaintiff then counted it and took it away into his house; that the defendant said "Here is the amount, Rs.1800," and the plaintiff said "This is hibanama money." Then Bakridi says that the defendant took the Rs.1800 out of a box and counted it and gave half to the witness and half to Mohun; that they tied it up in separate parcels and reached Chhilgawan a little after 1; that the defendant then told them to place it before the plaintiff; that they did so, and the amount was counted and tested and tied up in two bundles of Rs.900 each; that the plaintiff took up one and the witness the other, and placed them before the plaintiff's wife; and that the deed was not prepared till some days after. The evidence of these witnesses varied very greatly in detail; but they all swore that the money was paid in their presence. As already mentioned, this story about payment has not found credence in any Court. It has been proved that the defendant had not any means at the time not even enough to pay for the

stamp on the deed, which was bought by the plaintiff. The defendant's case is as bad a case of circumstantial mendacity as could well be, and it shews not only that the defendant's own statements are utterly untrustworthy, but also that he had both the will and the power to suborn other persons to give false testimony in support of his case.

So far, therefore, as the defendant's case is rested upon the deed in question being a conveyance for value, it fails entirely.

But the defendant also sets up another defence (which is quite inconsistent with his defence that the deed was for valuable consideration), viz., that this deed was founded on the natural love and affection which the plaintiff had for him as his nephew, and also for the plaintiff's niece, whom the defendant was about to marry; in pursuance of which the plaintiff placed him at once in possession of all his property except the reserved portion of Akbarpur. It does not seem a very probable story that the plaintiff should at once irrevocably hand over to the defendant all his property except a few rupees; but certainly there is evidence that on many occasions subsequently the plaintiff spoke of the property as having been given by him to the defendant, though he often said, and says now, that this was subject to the reservation of it to himself and his wife during their lives, and subject to its being managed by the defendant during the absence of the plaintiff and his wife on their intended pilgrimage. The defendant denies that any such reservation was intended. and he relies upon the absence of any such reservation from the deed except as to Akbarpur, for which special provision was made. This no doubt is a point in favour of the defendant, but it is necessary to consider carefully all the circumstances of the case.

By the Mahomedan law (by which the present case is governed) a holder of property may in his lifetime give away the whole or part of his property if he complies with certain forms; but it is incumbent upon those who seek to set up such a transaction to shew very clearly that those forms have been complied with. It may be by deed of gift simply, or by deed of gift coupled with consideration. If the former, unless accompanied by delivery of the thing given, so far as it is capable of

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delivery, it is invalid. If the latter (in which case delivery of possession is not necessary), actual payment of the consideration must be proved, and the bona fide intention of the donor to divest himself in præsenti of the property, and to confer it upon the donee, must also be proved: see *Ranee Khujoorroonissa v. Mussamut Roushun Jehan*. (1)

Reference was also made by the defendant's counsel to the Transfer of Property Act, 1882, c. 7, as to gifts, and to certain cases decided under it which shew that by the Hindu law delivery of possession is not essential. But they have no bearing upon this case, as s. 129 of the Act provides that nothing contained in that chapter should be deemed to affect any rule of Mahomedan law.

It now becomes important to consider whether the possession of the property comprised in the deed was or was not delivered to the defendant as he alleges. The parol evidence upon this point is very voluminous and very conflicting; but upon full consideration of it their Lordships have come to the conclusion that the defendant has failed to establish that possession was delivered, and in doing so they rely especially upon certain matters which seem to them beyond dispute.

Part of the property described in the deed and claimed by the defendant is a house at Chhilgawan, which had been built by and belonged to the plaintiff, in which he and his wife resided before and at the time of the execution of the deed. The plaintiff did not, as contemplated, go to Mecca soon after that time, being prevented at first by an accident, and afterwards by the illness of himself and his wife. When the defendant married, the plaintiff invited him and his wife to come and live with him at the house in question; and they did so, and were maintained by him there until 1894, when the plaintiff and his wife made the long contemplated pilgrimage to Mecca, on which they were absent about six months. During their absence the defendant and his wife continued to live in the house; but on their return the plaintiff and his wife went back to their home and have continued to reside there ever since. The defendant also remained there for a short time till his wife died; after her death the

(1) L. R. 3 Ind. Ap. 291¹

defendant married again, and differences having arisen between him and the plaintiff, the defendant went away and lived in Nidura, while the plaintiff remained in the house as before. Each party says he was in possession of that house; but upon the above facts, which are not in dispute, their Lordships have no difficulty in coming to the conclusion that this house was all along in the possession of the plaintiff.

Next, with reference to the village of Chhilgawan, it was at the date of the deed held by the official assignee of the mortgagees, and the plaintiff was in actual possession under a lease from him. On its subsequent redemption the co-sharers Mehdi Hasan, Hadi Hasan, Abdus-Sattar and Abdul Ghaffar entered into possession and divided the profits in equal shares. The defendant admitted that the plaintiff had always received his one-third share of these profits, but says that he did so with his permission for his expenses—a statement which is not corroborated. But it is not necessary on this point to do more than refer to certain proceedings early in the year 1897. In that year the plaintiff and defendant had disputes about the collections in Chhilgawan, and while the proprietors were fighting the cultivators suffered; and some of them took criminal proceedings for assault against the plaintiff and others. Shortly afterwards the plaintiff and defendant made an amicable arrangement before the Court under which Parmeshur Din was appointed to receive the rents of Chhilgawan, and after payment of the Government dues to divide the surplus into three equal shares and pay them to the plaintiff, Hadi Hasan, and Abdus-Sattar and Abdul Ghaffar; and thereupon the proceedings were stayed. The plaintiff and defendant each made a deposition in support of that order, and the defendant's deposition contained this passage:—

“The money realized from village Chhilgawan every year used to be distributed among Hadi Hasan, Abdus-Sattar and Abdul Ghaffar, sons of Chaudhri Abdul Razzak, and Chaudhri Mehdi Hasan, each getting a one-third share”; and the defendant agreed that the rents should be received thenceforth by Parmeshur Din, and divided by him among the same persons as before. The plaintiff's deposition contained a statement to the like effect.

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J. C. With reference to Akbarpur, there is no doubt that it was left
1906 in possession of the plaintiff.

CHAUDHRI With regard to Sarawan and Raushanabad the facts stand
MEHDI thus: In 1889 a new mortgage was made upon Udaria; part of
HASAN the money raised was applied in paying off the prior mortgage
v. thereon, and out of the balance the existing mortgage on
MUHAMMAD Raushanabad was paid off. About the same time the mortgage
HASAN. existing on Sarawan was satisfied by the sale of one-half of that
 property, and the remaining one-half of Sarawan was redeemed.
 Abdus-Sattar, one of the co-sharers (whose evidence no one has
 impeached), says that the plaintiff and Hadi Hasan, and he and
 his brother, handed over Sarawan and Raushanabad to the defen-
 dant to manage and make collections, pay Government revenue,
 and keep the balance in deposit with him for the purpose of
 redeeming the mortgage on Udaria from Abdul Kasim. The
 plaintiff confirms this statement; and Ram Parshad (who was
 employed by the defendant to collect the rents of Raushanabad)
 and Mubarak Ali and Din Dayal all depose that the defendant
 made statements to them to the same effect. Moreover, the
 plaintiff in his deposition made to support the consent order
 above referred to, said:—

“As to the collections of the remaining villages Sarawan and Raushanabad, Chaudhri Muhammad Hasan shall continue to make them in order to pay off the mortgage money on village Udaria while I shall make collections in Akbarpur.”

The defendant was not so explicit; his deposition is:—

“As to the collections of the remaining villages, Sarawan and Raushanabad, I shall continue to make them hereafter as I have been doing hitherto.”

But he did not contradict or dispute the plaintiff's statement as to what was the object and purpose of his doing so. It must be remembered also that the defendant was receiving the entirety, and not one-third only, of the profits of these villages; and as to two-thirds they clearly must have been received for some specific purpose; and according to the defendant's statement the whole was to be received and applied for the same object. Under these circumstances the defendant did, no doubt, collect considerable sums in respect of the Sarawan-Raushanabad

properties; but this does not prove that he had possession of one-third against the plaintiff, any more than it proves that he had possession of the other two-thirds against the co-sharers.

The learned Judicial Commissioner stated that although the defendant did not admit that there was any arrangement that the profits of Sarawan and Raushanabad should be retained by him towards the redemption of the mortgage of Udaria, the fact that the accounts of those villages were kept separate from the accounts of Chhilgawan, and that the profits of those villages had not been divided, did lend support to the view that these profits were set apart to redeem that mortgage. He held, however, that this was insufficient to shew that as between the plaintiff and defendant the latter was trustee of the plaintiff's one-third, as well as of the two-thirds of the other co-sharers. But their Lordships do not concur in this view. It seems to them improbable that the passages above referred to as to the application of the rents of those villages should have been introduced into the depositions of the plaintiff and defendant as above mentioned, if the plaintiff had no interest in those villages or the rents thereof, or in the application of the collections therefrom. Again, the undated letter from the defendant to the plaintiff (set out in the Record), in which he offers to account to the plaintiff or to any other person he may name in respect of Abdul Kasim's mortgage and the collections of Sarawan and Raushanabad, is quite inconsistent with the defendant's contention that the plaintiff had no interest in those properties respectively. It is plain, therefore, that the defendant had not possession of these villages under the deed in question, but as a trustee by arrangement for all the co-sharers, including the plaintiff.

With respect to the other small properties, shares, dues, and duties, their Lordships do not think it necessary to trace out the details of possession in each case; it has been done very carefully by the Subordinate Judge, and their Lordships adopt his reasons and conclusions. They merely desire to add two remarks—one is that the defendant's father, Hadi Hasan, is entitled to a one-third share of the properties in question, and, naturally enough, the defendant (as his witness, Angad Singh, Zemindar of Raipur,

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states) made collections of Hadi Hasan's share also; yet no attempt has been made by the defendant to shew on whose account the various payments to him have been made; and Hadi Hasan was not called as a witness, though his evidence might have been useful on this point; and unless the payments made to the defendant could be shewn to have been made on account of the plaintiff's share, the evidence is valueless. The other is that they do not attach the slightest weight to the evidence of the defendant, and, looking at the mode in which the evidence as to the Rs.2000 was fabricated by him, they regard with great distrust much of the other evidence adduced on his behalf.

Their Lordships are therefore of opinion that the defendant's contention that possession of the properties comprised in the deed was given to him has wholly failed.

The circumstances connected with the mortgages to Abdul Kasim and Mata Din do not seem to their Lordships very material, having regard to the fact that the mutation of names had already been effected.

Their Lordships are of opinion that the deed which purported to be a conveyance for value was a transaction in which no consideration passed or was intended to pass; that in executing that deed the plaintiff did not intend to give the property to the defendant except subject to a reservation of the possession and enjoyment to himself and his wife during their lives, to which the defendant pledged himself; and that the deed was not followed by delivery of possession, but was a fictitious and benami deed and was invalid and void.

Under these circumstances their Lordships are of opinion that the decision of the Subordinate Judge was right and should be affirmed; and they will humbly advise His Majesty that this appeal should be allowed; that the order of the Court of the Judicial Commissioner of Oudh should be reversed, and the appeal to that Court should be dismissed with costs; and that the order of the officiating Subordinate Judge of Barabanki should be restored.

On July 5, 1905, the appellants applied that this appeal, which was at that time set down, should stand over until the

November sittings. Their Lordships assented to this course, but ordered the appellants to pay in any event the respondent's costs of that application, and of the case orders which the respondent had been compelled to take out. The respondent must pay the costs of this appeal, but must be allowed to set off against them the costs mentioned above.

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Solicitors for appellants: *Barrow, Rogers & Nevill.*

Solicitors for respondent: *T. L. Wilson & Co.*

MALIK AHMAD WALI KHAN PLAINTIFF;
AND
MUSAMMAT SHAMSI JAHAN BEGAM }
AND ANOTHER } DEFENDANTS.
ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

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Nov. 28.
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March 21.

Transfer of Property Act, s. 95—Construction—Charge on the Interests of Co-mortgagors—Redemption—Contribution.

Sect 95 of the Transfer of Property Act says that "where one of several mortgagors redeems the mortgaged property and obtains possession thereof," he has a charge on the shares of his co-mortgagors for contribution to his expenses "in so redeeming and obtaining possession":—

Held, that the section must be construed distributively, and that the charge follows on redemption; the condition of obtaining possession applies only to cases in which its fulfilment is from the nature of the mortgage possible.

Where one of three mortgagors paid off the mortgage debt in full and then sued the other two to recover the whole amount paid with interest, alleging that he was a surety only:—

Held, that on failure to prove an agreement of suretyship he was nevertheless entitled to recover two-thirds, and that although neither he nor the original mortgagee had obtained possession of the mortgaged property the decree ought to give him a charge on the respondents' interests therein.

APPEAL from a decree of the High Court (February 24, 1898) setting aside a decree of the Subordinate Judge of Bareilly (December 19, 1900) and dismissing the appellant's suit.

* *Present*: LORD DAVEY, SIR FORD NORTH, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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The suit was brought to recover Rs.16,425 on account of principal and simple and compound interest as stipulated in a bond dated October 6, 1896, which comprised property both of the appellant and of the respondents. It alleged the circumstances under which it was executed; and further stated, "It was, however, agreed upon between the plaintiff and the defendants that he should only be a surety, and they should be liable to pay the entire amount of the document." It alleged that the whole of the consideration money was paid to the defendants, and that "the plaintiff did not receive any portion of the said consideration, nor was it ever spent for the benefit of the plaintiff." It alleged his repayment of the amount due to the mortgagee, and claimed that "as a representative of the mortgagee the plaintiff is competent to get all the mortgagee's right enforced as against the defendants."

The relief prayed was the recovery of the whole amount, principal and interest payable under the bond in accordance with its terms, with a charge on the property of the respondents mortgaged by the said deed.

The respondents denied receipt of the consideration money, and that the money was wanted as alleged for their brother's case or had been spent thereon. They concluded, "The plaintiff can claim only the rateable amount which he may prove to have given to the answering defendants."

The Subordinate Judge decreed the suit in full, finding as a fact that the whole amount of the consideration money "was paid at the time of registration to the defendants."

The High Court found that the money was "not intended to go into the pockets of either the plaintiff or the defendants; that the money was, as a matter of fact, handed over to the defendants in the presence of the Sub-registrar is true, but this was done at the instance of the plaintiff himself, who, according to the registration endorsement upon the bond, requested that the money might be paid in the presence of the defendants. It is to be observed in this endorsement it is not requested that the money should be paid to the defendants, but merely that it should be paid in their presence. From this we gather that the intention was not that it should be paid to the defendants for

their own personal use, but simply that the mortgagee should have the protection of having it paid in the presence of all the mortgagors."

It was of opinion that the case made by the appellant that he was to be a surety only was untrue, and that he was not entitled to the relief sought by him. At the hearing of the appeal the appellant asked for a decree for contribution towards the amount of the debt which had been discharged by him. The Court refused to grant this relief as inconsistent with the character of the suit, and as shewing indulgence to a litigant who comes into Court with a false case.

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Cowell, for the appellant, contended that it was proved by evidence, which the respondents had not been called to deny, that the moneys secured by the bond had been paid to the respondents. They borrowed the money, and the appellant was by agreement between him and them a surety only, and was so regarded by the lender, the respondents again not denying the case made. Under these circumstances he was entitled as specifically prayed in his plaint. Otherwise he was, under s. 95 of the Transfer of Property Act, entitled to recover two-thirds of the amount paid by him, with interest at the stipulated rate, and to have a charge declared in his favour on the respondents' interests in the mortgaged property.

De Gruyther, for the respondents, contended that the agreement for suretyship was not proved by the evidence, and had not been upheld by either of the Courts below. He referred to s. 65 of the Indian Contract Act. Sect. 95 of the Transfer of Property Act only gave a charge on redemption to a mortgagor who had obtained possession from the mortgagee on satisfying the mortgage. It should be construed strictly, and did not apply to a case where the mortgagor had redeemed but had not obtained possession.

Cowell replied.

The judgment of their Lordships was delivered by

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SIR ARTHUR WILSON. This is an appeal from a decree of the High Court of Allahabad of February 24, 1908, which set aside

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J. C. the decree of the Subordinate Judge of Bareilly of December 19,
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The plaintiff, Malik Ahmad Wali Khan, is brother of the half-blood of the two ladies who are defendants. In the year 1896 a criminal charge was pending against Sardar Wali Khan, a half-brother of the plaintiff and whole brother of the defendants; and the various members of the family took steps to procure funds for the defence of the accused man.

On October 6, 1896, the plaintiff and the defendants executed a mortgage bond of the ordinary kind for the sum of Rs.10,000 in favour of Banarsi Parshad, by which the plaintiff hypothecated certain property belonging to him, and the defendants certain property belonging to them.

On November 2, 1896, the plaintiff paid off the mortgage, the sum actually paid for principal and interest being Rs.10,025.

On April 2, 1900, the plaintiff filed his plaint in the present case, in which he alleged that he had joined in the mortgage only as surety for his half-sisters the defendants, and claimed to recover from them the whole amount of what he had paid, with interest. The defendants in their written statements denied having been parties to the borrowing at all, but it was added, "The plaintiff can claim only the rateable amount which he may prove to have given to the answering defendants."

At the trial before the Subordinate Judge the plaintiff himself gave some evidence, chiefly during his cross-examination, of an express agreement between him and his half-sisters that he should be a mere surety for them in the matter of the mortgage bond. Neither of the Courts in India appear to have given credence to that evidence, and their Lordships think those Courts were right.

The Subordinate Judge, however, made a decree in favour of the plaintiff on the ground that the mortgage money was shewn to have been handed to the defendants in the presence of the Registrar, and was not shewn to have been returned by them to the plaintiff. The handing of the money to the defendants was carried out by arrangement on the part of the plaintiff, and the ladies were at the time living in his house where the payment was made. The learned judges of the High Court considered that these circumstances were quite insufficient to prove that the

plaintiff was a mere surety in the matter of the mortgage, and their Lordships agree in this view.

It was contended, however, before the High Court, and again before their Lordships, that the plaintiff was nevertheless entitled to recover from the defendants a proportionate share, that is to say, two-thirds, of the amount he paid to the mortgagee. The High Court rejected this contention on the ground that the Court could "shew no indulgence to a litigant who comes into Court with a false case." It appears to their Lordships that the question is hardly one of indulgence, and that the plaintiff in this case ought not, by reason of his having claimed too much, to be precluded from recovering a proportionate amount of what he actually paid, to which he is undoubtedly entitled, a claim which the pleadings are wide enough to cover.

It was further contended that under s. 95 of the Transfer of Property Act (IV. of 1882) there ought to be a decree giving the plaintiff a charge on the interests of the defendants in the mortgaged property. That section says that :

"Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession."

That section might be so strictly construed as to limit its operation to mortgages under which possession passes, and, therefore, on redemption properly re-passes. But it seems to their Lordships more reasonable to construe the section distributively, to make the condition of obtaining possession apply only to the cases in which its fulfilment is from the nature of the mortgage possible, and in other cases to make the charge follow upon redemption.

Their Lordships will, therefore, humbly advise His Majesty (1.) to discharge the decrees of the High Court and Subordinate Judge ; (2.) to declare that the plaintiff is entitled to recover against the defendants two-thirds of the sum of Rs.10,025 paid by him to redeem the mortgage, with interest at 6 per cent. per annum from the date of the institution of the suit, and that he is entitled to a charge in respect thereof upon the defendants'

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J. C. interest in the mortgaged property ; (3.) to remit the case to the
 1906 High Court to determine the amount due from the defendants
 MALIK and the time within which it should be paid by them and to give
 AHMAD all necessary directions as to the re-transfer or realization of the
 WALI KHAN mortgaged property of the defendants, and otherwise to give
 v. effect to His Majesty's Order ; and (4.) to order that inasmuch as
 MUSAMMAT the costs of the case in the two Courts in India appear to have
 SHAMSI been occasioned substantially by the untrue cases set up on the
 JAHAN one side and on the other, no costs in either of these Courts
 BEGAM. should be given. For the same reason there will be no order as
 ————— to the costs of this appeal.

Solicitors for appellant : *Ranken Ford, Ford & Chester.*

Solicitors for respondents : *T. L. Wilson & Co.*

J. C.* ISMAIL MUSSAJEE MOOKERDUM PLAINTIFF ;
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 AND
 Feb. 15, 16 ; HAFIZ BOO DEFENDANT.
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 —————
 ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

*Practice—Suit to set aside Transaction on the ground of Dementia—Undue
 Influence—Benami—Evidence of Gift.*

A Mahomedan mother transferred nearly the whole of her estate or its proceeds to her daughter, partly by actual transfer and partly by purchases with the sale proceeds in the daughter's name.

In a suit by her son after her death to set aside these transactions on the ground of dementia :—

Held that, dementia not being proved, the plaintiff could not succeed on the ground of undue influence which had been neither alleged, nor investigated, nor proved ;

Held, further, with regard to purchases in her daughter's name with the sale proceeds, and to transfers for consideration which was never paid, that the resulting inference that they were benami transactions was rebutted by the evidence of gift, and by the proved intention to exclude the son from inheriting.

APPEAL from a decree of the Chief Court (April 21, 1904), reversing a decree of Bigge J. (December 5, 1902).

* *Present* : LORD DAVEY, LORD ROBERTSON, LORD ATKINSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON,

The question decided was as to the validity of certain alienations in 1889 of her property made by Khaja Boo, who died in 1900, in favour of her daughter Hafiz Boo, and to the exclusion of the appellant, her son. The suit was brought in 1901 against the daughter and the holders of the powers of attorney granted by the mother, under which the transactions were effected; and the ground for impeaching them was stated in the plaint to be "that at the time of the occurrences hereinafter mentioned the said Khaja Boo was suffering from dementia, and was not in a fit state of mind to execute contracts or to manage her affairs; and that up to the month of July, 1898, the first defendant (i.e., Hafiz Boo) was residing with the said Khaja Boo, who was entirely under her dominion and control, and the first defendant and, as the plaintiff believes, the other defendants were well aware of the mental condition of the said Khaja Boo."

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The judgment of the first Court was as follows:—

"I have come to the conclusion that each party, as might be expected, have put their case too high as regards Khaja Boo's mental condition; and that she was neither a hopeless and incapable imbecile as the plaintiff would have me believe, nor a strong-minded capable woman of affairs as portrayed by the defendant. The plaintiff's evidence, when read carefully, does not in any way establish the complete insanity which is his case, and I think that it is clear that Khaja Boo was an impressionable old woman, whose mental and bodily faculties at the time of the occurrences in issue, when she was seventy-eight years old, were enfeebled by age, with the result that she was at the mercy and was the tool of her unscrupulous daughter or son, as one or the other was for the time being the captor, and—to continue the metaphor I have borrowed from Mr. Lewis—enjoying the spoils. I think the plaintiff would have been wise if, instead of basing his claim on the untenable theory of his mother's madness, he had rested it on undue influence."

He then dealt with the case as one of undue influence, finding that Hafiz Boo had not discharged the onus which was on her to prove that the transactions were explained to Khaja Boo, that she knew what she was doing, and had had independent legal advice. In the result he made a decree for administration,

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holding the daughter liable to account for the purchase-money of lot No. 27, mentioned in the judgment of their Lordships, and setting aside the conveyance of lot No. 6 to her, and of another house to the appellant.

The Chief Court confirmed the finding that Khaja Boo was of sound mind, adding that there was no proof of undue influence, but that the intention of Khaja Boo to make valid gifts of her property was established.

C. W. Arathoon, for the appellant, contended that on the oral evidence, and also from the inferences to be drawn from the various transfers in question in suit, the Court below should have held that Khaja Boo did not execute them of her own free will, after fully understanding their effect. The onus was on the respondents to shew the valid execution of these documents, and that they were binding on the deceased Khaja Boo. The appellant had adduced evidence from which it was shewn that they were obtained from her by fraud and undue influence exercised over her failing faculties, as found by the Court of first instance. Khaja Boo was a pardanishin, and the two attorneys were Rangoon men, unknown to her. The deeds deprived her of all her property, the respondent's husband obtaining the execution through his wife's influence over her mother; were in a language which she did not understand; were not read over and explained; and she had no independent legal advice and assistance. As no consideration was proved to have passed, and no effective possession followed, the presumption was that the transactions were benami. He referred to *Hakim Muhammad Ikramuddin v. Najiban* (1); *Hasan Ali v. Nazo*. (2)

Cohen, K.C., and *De Gruyther*, for the respondent, contended that the suit was based upon a case of dementia, and that the deeds were impeached on that ground alone. Concurrent findings by the Courts below that that case failed were conclusive in favour of dismissing the suit. No case of undue influence had been alleged or put in issue or proved, and no case of that kind can be the subject of adjudication in this appeal. If that case could be made, the onus was on the appellant to prove it, and he

(1) (1898) L. R. 25 Ind. Ap. 137.

(2) (1889) I. L. R. 11 Allah. 456.

had failed. Besides, art. 91 of Act XV. of 1877, Sched. II., applied to all cases of undue influence. There was no presumption in favour of these transfers being benami, for the evidence was overwhelming both that Khaja Boo intended to exclude the appellant from inheriting and intended that her daughter should take beneficially. Both intentions would be defeated if the transfers were held to be benami. Reference was made to *Rani Janki Kunwar v. Raja Ajit Singh*. (1)

Arathoon replied.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The suit out of which this appeal arises related to certain transactions on the part of Khaja Boo, a Mahomedan woman, who died in the year 1900, at an advanced age, said to have been ninety years.

The transactions in question took place in 1889. Khaja Boo resided at Rander, near Surat, in the Bombay Presidency; but she and her family seem to have had connections of long standing with Rangoon. She had, at the time of the events which have to be considered, one son, the present plaintiff, appellant, and one daughter, the present defendant, respondent. With her son, whose antecedents were not good, she was on terms of bitter hostility, and much litigation had taken place between them. The daughter was a married woman, whose husband resided in Rangoon; but she herself was living with her mother at Rander.

Khaja Boo owned a house in Rander, and two properties in Rangoon. One of the latter was the fifth class, Lot No. 27 in Block C ii., the other an undivided half-share in Lot No. 6 in Block E in Barr Street, in which the other half share belonged to Adjim Hassim Mookerdum, of Rangoon, the husband of Hafiz Boo.

On January 19, 1889, Khaja Boo executed at Rander a power of attorney in favour of two residents of Rangoon, Cassim Hashim Baroocha and Ismail Ebrahim Munnee, which conferred on the attorneys very general powers to act on behalf of Khaja Boo in Rangoon, but nothing of great importance turns on this power.

(1) (1887) L. R. 14 Ind. Ap. 148.

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On February 12 in the same year, 1889, Khaja Boo executed at Rander another power in favour of the same two persons, by which, in addition to a general authority to act for her, she expressly empowered her attorneys to deal with the two properties which have been mentioned. She authorized them to sell and dispose of lot No. 27, and "to pay the sum realized from such sale to my daughter Hafiz Boo, either in cash, or by purchase at her will and consent from the whole or part of the said sum, lands, houses, and shares". . . . and to have the same "transferred to the name of the said Hafiz Boo, her heirs and legal assigns."

As to the undivided half-share in lot No. 6, she authorized her attorneys to obtain a partition with the owner of the other half-share, and "to have my portion of the land, viz., fifty feet by eleven feet, with all buildings and erections thereon, at an estimated value of Rs.10,000 (ten thousand) only, for the payment of which sum I have fully and finally arranged and settled with my said daughter Hafiz Boo, to be wholly and absolutely transferred to the name of the said Hafiz Boo for the benefit of herself, her heirs, and legal assigns."

Of the two attorneys thus appointed the first, Cassim Hashim Baroocha, was a man who appears to have carried on in Rangoon, on a considerable scale, the business of land management under powers of attorney from absent proprietors. So that there is nothing in the choice of attorneys either improbable or justly suggesting suspicion.

The attorneys proceeded to act under the second power. They sold lot 27 and invested the proceeds, in part at least, in the purchase of several properties in Rangoon in the name of Hafiz Boo and presumably under her instructions. With regard to lot 6, they carried out the partition with the other part owner, and then executed on behalf of Khaja Boo a conveyance of her partitioned share to her daughter Hafiz Boo. The conveyance recited that Khaja Boo had agreed with Hafiz Boo for the sale to her of these premises for the sum of Rs.10,000. It proceeded to say that Khaja Boo in consideration of the Rs.10,000, of which the receipt was acknowledged, grants, assigns, and transfers the premises in question to Hafiz Boo, her

heirs, executors, administrators, and assigns, to hold them unto and to the use of the said Hafiz Boo, her heirs, executors, administrators, and assigns for ever.

On July 29, 1889, Khaja Boo executed another document, by which she recited the two powers of attorney which have been mentioned, acknowledged a variety of payments made by the attorneys, including the sum of Rs.11,020, to Hafiz Boo (being the price of lot 27), and the payment to Khaja Boo herself of Rs.298, at the time of the execution of the present deed, and proceeded to give an absolute release to the attorneys.

It would seem from the evidence that the documents which have been mentioned were prepared in Rangoon and sent to Rander for execution. There is nothing, their Lordships think, to be surprised at in this. It seems a not unnatural course with regard to documents affecting a professional land agent carrying on business in Rangoon, and documents, which were, in the main, to be acted on in Rangoon.

The effect of these transactions was, in substance, that Hafiz Boo became possessed of nearly the whole of her mother's Rangoon properties or their proceeds. The plaintiff admits that at a later period, after he had removed his mother to his own house, he obtained from her a conveyance to himself of her house at Rander.

The plaintiff brought the present suit on February 25, 1901, in the Chief Court of Lower Burma. He made defendants first his sister, Hafiz Boo, and second and third the two attorneys, but the suit against the attorneys was subsequently abandoned. The substantial object of the suit was to invalidate and annul the transactions of 1889 which have been mentioned.

The plaintiff alleged (paragraph 2) that at the time of the occurrence referred to "the said Khaja Boo was suffering from dementia and was not in a fit state of mind to execute contracts or to manage her affairs, and up to the month of July, 1898, the first defendant was residing with the said Khaja Boo, who was entirely under her dominion and control, and the first defendant, and, as the plaintiff believes, the other defendants were well aware of the mental condition of the said Khaja Boo."

The plaintiff prayed that the estate of Khaja Boo might be

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administered and the necessary accounts taken, that it might be declared that Khaja Boo was from a date prior to 1889 of unsound mind, that it might be declared that the sum of Rs.11,250 received as the price of lot No. 27 belonged to Khaja Boo, that any pretended gift of those proceeds to Hafiz Boo was invalid, and that the defendants were liable to account for those moneys, or their investments, as part of the estate of Khaja Boo, and that the conveyance of lot No. 6 might be declared invalid, and the property declared to be part of the estate of Khaja Boo.

The defendant Hafiz Boo denied the allegation of the plaint as to Khaja Boo's state of mind, as did the other defendants. Issues were settled, some of which must be mentioned. (1.) Was Khaja Boo in an unsound state of mind during the year 1889? (2.) Were the properties (those purchased from the price of lot 27) bought with funds belonging to the said Khaja Boo, and do such properties now form part of her estate? Was the conveyance of the southern half of lot No. 6 by Khaja Boo in consideration of Rs.10,000, paid by defendant, a valid conveyance? (3.) If not, is the plaintiff's claim to have it set aside barred by limitation?

The case came on for hearing before Bigge J., and a large mass of evidence was given directed to the question of Khaja Boo's mental capacity in 1889. It is unnecessary to examine the evidence from this point of view, because the learned judge found that the plaintiff had failed to shew that his mother was of unsound mind in 1889. The Court of Appeal took the same view, and their Lordships have not been asked to question those findings.

The learned judge at the trial, however, after negating the allegation of insanity, went on to say:—

“I think the plaintiff would have been wiser, if, instead of basing his claim on the untenable theory of his mother's madness, he had rested it on undue influence, from which aspect I now proceed to examine the case.”

From that point of view the learned judge came to the conclusion that Khaja Boo, at the period in question, was entirely under the control and domination of her daughter; that the latter had unscrupulously used her power over her mother

in order to get her mother's property into her own hands, and that the whole proceedings ought to be avoided on the ground of undue influence.

He accordingly gave a decree directing that Khaja Boo's estate should be administered under the direction of the Court, declaring that Hafiz Boo was liable to account for the price of lot No. 27, and that the conveyance to her of the partitioned half of lot No. 6 was invalid, and must be cancelled, and ordering the usual account and inquiries. The case came on appeal before the learned Chief Judge, and Birks J., who reversed the finding with respect to undue influence, and dismissed the suit with costs in both Courts. Against that decision the present appeal has been brought.

The principal contention before their Lordships on behalf of the appellant was, that the finding of Bigge J. on the question of undue influence was right and ought not to have been reversed by the Court of Appeal. With regard to this contention their Lordships must observe that the question of undue influence was never properly before the Court at all. No such case was set up in the pleadings. The nearest approach to it was in the passage of the plaint already cited, in which it was said that Khaja Boo was entirely under the dominion and control of her daughter; but that is only said incidentally in connection with the allegation of mental incapacity, which allegation formed the real case of the plaintiff. And accordingly, when the issues were settled, there was a clear issue as to Khaja Boo having been of unsound mind in 1889, but none with regard to undue influence. The result has been that the question of undue influence has been discussed and considered, not upon evidence given with reference to that question, but upon evidence called for a totally different purpose.

Assuming, however, that undue influence might properly be made a ground of decision in the present case and under the present circumstances, their Lordships agree with the Court of Appeal in thinking that the evidence is insufficient to establish anything of the kind. As their opinion is in accordance with the judgments appealed against, they think it unnecessary to examine the evidence in minute detail. They think it sufficient to indicate its general purport.

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Khaja Boo was a very old woman, with the natural infirmities incident to her age. She was not of unsound mind or unable to attend to business. She is spoken of as pardanishin, but she had no objection to communicate, when necessary, in matters of business, with men other than members of her own family, and to some extent she did so. She was able to go to Court and give evidence in her litigation against her son, and she was able to attend at the registrar's office in person to acknowledge her deeds for the purpose of registration.

On the other hand, her daughter resided with her, presided over her household, and had the general management of her affairs. It is not shewn whether, with regard to the specific transactions impugned, the mother consulted anybody.

As to those transactions themselves, they appear to their Lordships to have been very natural under the circumstances existing at the time. The mother was extremely hostile to her son. She was old, and in case of her death her son would have inherited the greater part of her property. The only apparent way to prevent his doing so was to divest herself of the property in her lifetime. What the son himself thought about his mother's intentions appears from the fact found, that he issued an advertisement declaring her to be insane, and that any conveyance by her would be ineffectual.

The mere relation of daughter to mother, of course, in itself suggests nothing in the way of special influence or control. The evidence seems to their Lordships quite insufficient to establish any general case of domination on the part of the daughter, and subjection of the mother, such as to lead to a presumption against any transaction between the two. With regard to the actual transactions question, there is no evidence whatever of undue influence brought to bear upon them. For these reasons their Lordships are of opinion that no case of undue influence has been established, and that therefore the general contention of the appellant fails.

It was further contended, however, that, irrespective of any question of undue influence, the proper legal inference, both with respect to lot No. 27 and the properties purchased with its sale proceeds, and with respect to the partitioned share of lot No. 6,

was, that there was no valid transfer to Hafiz Boo, that she was a mere benamidar for her mother, and that the whole property formed part of the estate of the latter. This view was accepted by the learned judge at the trial, but not by the Court of Appeal. The case stands somewhat differently with regard to the one property and the other.

The power of attorney of February 12, 1889, when dealing with lot No. 27, by its terms seems to contemplate an absolute gift of the sale proceeds to Hafiz Boo, and this is how she treated the matter in her written statement. In her evidence, which was very confused, she tried to say that she paid that purchase-money to her mother. This was clearly untrue, as both Courts have found. The fact, therefore, remains that the properties purchased by the sale proceeds were purchased no doubt in Hafiz Boo's name, but were purchased out of funds emanating from her mother's estate. This circumstance no doubt, if taken alone, affords evidence that the transaction was benami, but there is, in their Lordships' opinion, enough in the facts of the case to negative any such inference. It seems clear that what was done in 1889 was prompted by hostility to the son, and was with a purpose of excluding him from inheritance, an object which could not have been attained by any benami transaction. And the strong words of gift contained in the power of attorney are in accordance with this intention and calculated to give full effect to it. The question being purely one of intention, their Lordships think that the evidence points to an absolute gift, not to a benami transaction.

The power of attorney, when dealing with the other property, lot No. 6, in its terms seems to regard the transfer to Hafiz Boo of the partitioned share as a sale for Rs.10,000 already paid, and the conveyance to Hafiz Boo of April 22, 1889, is to the same effect. Both in her written statement and in her evidence, Hafiz Boo asserted that she had actually paid the Rs.10,000 to her mother, which is certainly not true. It was contended that this transaction must be regarded as a benami one, or, at any rate, that if a genuine transaction at all, it was a sale, not a gift, and it was said that the property still formed part of the mother's estate.

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J. C. Here, again, the question is purely one of intention. The
1906 observations already made with respect to the general purpose of
KhaJa Boo fully apply to the present property. The language of
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The fact that the sum of Rs.10,000 is mentioned as the price, a sum which, according to the evidence, was far short of the actual value of the property, and the fact that that sum is stated to have been paid in advance, whereas in fact it was not paid at all, are strong to shew that the transaction was not a sale, but a gift, with an imaginary consideration inserted, in a manner common in such transactions in India. Their Lordships, therefore, think that, as to this second property also, the case of benami fails.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs.

Solicitors for appellant : *A. H. Arnould & Son.*

Solicitors for respondent : *Sanderson, Adkin, Lee & Eddis.*

MUSAMMAT LALI DEFENDANT ;

AND

MURLI DHAR PLAINTIFF.

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Feb. 22 ;
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ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Hindu Will in favour of adopted Son—Entry in Wajib-ul-arz—Persona designata—Gift dependent on validity of Adoption.

Assuming that a clause in the wajib-ul-arz in suit recorded under Act XIX. of 1873 can be treated as a will by the Hindu who signed it in favour of his adopted son :—

Held, that from a consideration of the descriptive words used after the ceremony of adoption had been effected, it was not the intention to give to him as a persona designata, but as an adopted son capable of inheriting by virtue of his adoption, and that the gift was dependent on the validity of the adoption.

Whether an entry in a wajib-ul-arz can be treated as a will depends in every case on the circumstances in which the entry was made and the construction it receives from extrinsic evidence.

APPEAL from a decree of the High Court (December 21, 1901) modifying a decree of the Subordinate Judge of Agra (June 18, 1897), which decreed the respondent's suit. The respondent sued, alleging his adoption by Dhanraj, the deceased husband of the appellant, who died in 1865 leaving a natural son born after the adoption, who died childless long before the suit. He also alleged that at the settlement of 1877 Dhanraj made a will, which he caused to be recorded in the village administration paper, to the effect that on his death the respondent should be his heir, and that if a son should be born to him (Dhanraj) that son and the respondent should hold the property in equal shares. He further alleged that the appellant after the death of Dhanraj did not allow his name to be entered in the Revenue papers and got her own name entered, and that two years after the death of Dhanraj she turned him out of the house. He sued in ejectment, claiming to be entitled to the whole property in dispute according to Hindu law "by right of adoption and under the will made by Dhanraj." The appellant denied the fact of adoption, its validity

* Present : LORD DAVEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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as being of Dhanraj's sister's son, and the will. The title under the adoption was, in the opinion of the High Court, disproved and, as the respondent did not cross appeal, the question at issue before their Lordships was as to the effect of the entry made by Dhanraj in the *wajib-ul-arz*, or administration paper of the village, in suit and set out in their Lordships' judgment.

This question the High Court decided in the following terms:—"It is contended on behalf of the plaintiff that this document is of a testamentary nature. Although in his plaint the plaintiff claimed to be entitled to the whole of the property under the terms of this document, his counsel admitted here—and, indeed, he could not do otherwise—that in the event of his failure to establish the adoption, he could not under that document claim more than half of the property. For the defendant it was contended that this was not a testamentary document, and, even if it were held to be of the nature of a will, there was no bequest to the plaintiff apart from or independent of the adoption—in other words, that the bequest to the plaintiff was conditional on the adoption standing good. We are of opinion that the document is of a testamentary nature. It provides for what is to happen in the event of a son being born to the testator, and makes a bequest to the plaintiff of a larger share of the property than he would be entitled to under the Hindu law; assuming that there had been a valid adoption the plaintiff would under that law have been entitled upon the birth of a son to Dhanraj to only one-fourth of his property, and not to the half-share to which Dhanraj declares he will succeed. We have had to consider whether this bequest by Dhanraj was contingent upon the adoption of Murlī being valid—in other words, to use the language of their Lordships of the Privy Council in the case of *Fanindra Deb Raikat v. Rajeswar Dass* (1), 'the question is whether the mention of the plaintiff as an adopted son is merely descriptive of the person who took under the gift or whether the assumed fact of his adoption is not the reason and motive of the gift, and, indeed, a condition of it.' In such a case the intention of the testator is what has to be looked to. The present case is somewhat similar to the case of *Nidhoomoni Debya v. Saroda Pershad*

(1) (1885) L. R. 12 Ind. Ap. 72, 89.

Mookerjee. (1) The effect of the will in that case according to their Lordships' view was as follows: 'I declare that I give my property to Koibullo whom I have adopted.' It was held that it was a gift by the testator to a designated person, and that it was immaterial whether the adoption was a valid one or not. We may also refer to the following passage at p. 89 of the judgment in the case reported in L. R. 12 Ind. Ap. p. 72. 'The distinction between what is descriptive only, and what is the reason or motive of a gift or bequest, may often be very fine, but it is a distinction which must be drawn from a consideration of the language, and the surrounding circumstances. If a man makes a bequest to his "wife A. B." believing the person to be his lawful wife, and he has not been imposed upon by her, and falsely led to believe that he could lawfully marry her, and it afterwards appears that the marriage was not lawful, it may be that the legality of the marriage is not essential to the validity of the gift. Whether the marriage was lawful or not may be considered to make no difference in the intention of the testator.' The principle of this ruling applies to the present case. Here we have a designated person, namely, Murli Dhar. To this person Dhanraj bequeathed half of his property. It is true he describes him as his adopted son, and it may be that he was under the impression that he was a validly adopted son. But, as stated above, he gives him more than a validly adopted son would get. This is an indication that the adoption was not the reason or motive of the bequest. There is no evidence to shew that any deception was practised upon Dhanraj. It is unnecessary to refer to all the cases that were cited in argument by counsel on both sides. Every case must be decided with due regard to the language of the document in question and the surrounding circumstances. In the present case, we arrive at the conclusion that it was Dhanraj's intention to make a bequest in favour of the plaintiff of a half-share, and that this bequest was not contingent upon the adoption being in all respects a valid adoption. The result is that we allow the appeal in part, and, varying the decree of the Court below, we decree in plaintiff's favour for half of the property claimed."

(1) L. R. 3 Ind. Ap. 253.

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Ross, for the appellant, contended that the respondent had not made out a title by devise. In the first place, the clause in the *wajib-ul-arz* did not constitute a will. It was a mere village record paper, and did not possess any testamentary value or effect. If it did, it had been misconstrued by the High Court. There was no valid gift to him as a *persona designata* independent of the will. There was no gift apart from or irrespective of his adoption. So far as there was a gift at all, it was conditional upon his filling the position of a validly adopted son. There was no intention to benefit him in any other character. Reference was made to *Bireswar Mookerji v. Ardha Chunder Roy* (1); *Fanindra Deb Raikat v. Rajeswar Dass* (2); *Uman Parshad v. Gandharp Singh* (3); *Superunddhwaja Prasad v. Garuraddhwaja Prasad* (4); *Mathura Das v. Bhikhan Mal*. (5) The High Court laid stress upon the mention of *Murli Dhar* by name in the devise. But that was only in the *wajib-ul-arz* of one village. The name was not mentioned in the *wajib-ul-arz* of the other villages. The gift was dependent on a valid adoption, and a sister's son could not be legally adopted: see *Bhagwan Singh v. Bhagwan Singh*. (6)

The respondent did not appear.

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The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. The suit in this case was brought by *Murli Dhar*, the present respondent, against *Musammat Lali*, the present appellant, for possession of immovable property belonging to the estate of one *Dhanraj*, deceased. The appellant is the widow of *Dhanraj*, and the respondent claimed the property under a double title—first, as the adopted son of *Dhanraj*; and, secondly, under the terms of a will contained in a *wajib-ul-arz* alleged to have been duly recorded, in relation to a village forming part of the property, by *Dhanraj* during his lifetime. The result of the litigation in India was to set aside the adoption as invalid according to Hindu law; but the High Court at Allahabad gave the plaintiff a decree for half the property claimed, on the ground

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| (1) (1892) L. R. 19 Ind. Ap. 101. | (4) (1893) I. L. R. 15 Allah. 147, |
| (2) L. R. 12 Ind. Ap. 72, 89. | 166. |
| (3) (1887) L. R. 14 Ind. Ap. 127, | (5) (1896) I. L. R. 19 Allah. 16. |
| 134, | (6) (1898) L. R. 26 Ind. Ap. 153. |

that the clause in the *wajib-ul-arz* upon which the plaintiff relied was "a document of a testamentary nature," under which it was the intention of Dhanraj to make a bequest in favour of the plaintiff of a half-share in his property, and that this bequest was not contingent upon the validity of the adoption. No appeal has been filed against so much of the judgment of the High Court as relates to the adoption, but the defendant has appealed on two grounds—first, that the clause in the *wajib-ul-arz* does not constitute a will; and, secondly, that if it does, there was no bequest to the plaintiff apart from and irrespective of his adoption, and a valid adoption was the condition upon which the alleged bequest depended.

The term *wajib-ul-arz* in the North-Western Provinces is applied to what is considered to be the most important document contained in the official records relating to the village administration. Entries therein, properly made and authenticated by the signatures of the officers who made them, have been held by this Committee in the case of *Rani Lekraj Kuar v. Mahpal Singh* (1) to be admissible in evidence under s. 35 of the Indian Evidence Act in order to prove a family custom of inheritance, or, under s. 48, as the record of opinions as to the existence of such custom by persons likely to know of it. In giving their judgment their Lordships say: "These *wajib-ul-arz*, or village papers, are regarded as of great importance by the Government. They were directed to be made by Regulation VII. of 1822," the 9th section of which enacts that—

"It shall be the duty of collectors and other officers exercising the powers of collectors, on the occasion of making or revising settlements of the land revenue, to unite with the adjustment of the assessment and the investigation of the extent and produce of the lands, the object of ascertaining and recording the fullest possible information in regard to landed tenures, the rights, interests, and privileges of the various classes of the agricultural community. For this purpose their proceedings shall embrace the formation of as accurate a record as possible of all local usages connected with landed tenures, as full as practicable a specification of all persons enjoying the possession and property

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(1) (1879) L. R. 7 Ind. Ap. 63.

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And it was specially ordered that—

"The information collected on the above points shall be so arranged and recorded as to admit of an immediate reference hereafter by the Courts of Judicature."

As this Regulation was passed at the time of the introduction of a regular settlement of the land revenue into "the Ceded and Conquered Provinces," under which designation the districts afterwards known as "the North-Western Provinces" were at that time included, the object of the Government appears to have been to obtain a body of reliable contemporary evidence upon matters which might afterwards come into controversy, not only between the landholders and the Government, but between rival claimants to estates.

Regulation VII. of 1822 was repealed, as regards the North-Western Provinces, by Act XIX. of 1873, and it is to be observed that this Act, while providing, in the 62nd and following sections for the maintenance of a careful "record of rights" in each mahal, no longer included a record of "local usages connected with landed tenures" among the particulars to be entered. It was probably considered that, during the fifty years which had elapsed between the passing of the Regulation and the Act, such usages had been sufficiently ascertained, and that it was desirable that reference should be made to the earlier records when the existence of any such usage was asserted. For it is clear from a subsequent judgment of this Committee in the case of *Uman Parshad v. Gandharp Singh* (1) that, in later years, at any rate, attempts have been made by some proprietors to use these records as an indirect means of giving effect to their wishes with regard to the nature of their tenure, or the mode of devolution of their property after their death. When this has been the case, as Lord Hobhouse observes (2), these records are "worse than useless, they are absolutely misleading."

The wajib-ul-arz relied on in this case appears to have been verified by Dhanraj on July 2, 1877, and was therefore recorded under Act XIX. of 1873. It relates to a village called Daidana.

(1) L. R. 14 Ind. Ap. 127.

(2) L. R. 14 Ind. Ap. 135.

Under the head of "Inheritance, Second Marriage, and Adoption," the 10th paragraph contains the following statement:—

"I am the only zemindar in this village. I am a Marwari Brahmin. Seven years ago I adopted my sister's son, Murli. He is my heir and will be the owner. If, after this agreement, a son is born to me, half the property will be received by him and half by the adopted son. If more than one son are born to me, the property will be equally divided among them, including the adopted son, as brothers. I have two wives now. They will receive their maintenance from him (Murli) during their lifetime. If there are several sharers in future, each sharer shall be at liberty to marry a second wife in face of the existence of his first wife. No limit is fixed. After the death of a sharer his estate will be divided in equal shares with reference to the number of brothers, and not with reference to the number of wives. If one widow has children and the other is childless, the latter will receive a necessary maintenance. If a sharer dies without issue, his widow will be the owner of his property. If there are two widows, both of them will receive equal shares, and on their death the brothers and nephews of their husband will own the property according to their rights. A widow shall be competent to adopt a near relative in the family of her husband. There is no need for a will by husband. After the death of that widow her adopted son will be the owner of her property. If a widow marries again, she would be entirely excluded from inheritance. A sharer shall be at liberty to adopt his sister's son, or brother's son, or daughter's son, whomsoever he may like, and after his death his adopted son will inherit his property."

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Dhanraj died on April 3, 1885, without having made any other disposition of his property, and leaving him surviving, beside the adopted son Murli Dhar, a natural-born son named Nand Lal, who died childless in November, 1887. No question now arises as to the family custom with regard to adoption alleged in the *wajib-ul-arz*, both Courts in India having held that the evidence adduced by the plaintiff fell far short of establishing such a custom. Moreover it was decided by this Committee, in the case of *Bhagwan Singh v. Bhagwan Singh* (1), that under

(1) L. R. 26 Ind. Ap. 153.

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the general Hindu law applicable to the twice-born classes, the adoption of a sister's son is wholly void. The plaintiff's title to succeed as an adopted son to the property of Dhanraj is no longer suggested.

The only point remaining for consideration is whether the clause in the wajib-ul-arz can be treated as a will, under which the respondent is entitled to take, as a persona designata, independently of the adoption. It is unnecessary, and it would be incorrect, to lay down, as a general proposition, that a recital in a wajib-ul-arz cannot operate as a will in the case of a Hindu. In *Mathura Das v. Bhikhan Mal* (1), where the wajib-ul-arz contained these words, "Musammat Sohni, wife of my son Salig Ram, shall be regarded as the owner (malik) after my death," both parties agreed that the statement amounted to a testamentary bequest in favour of Sohni, and the High Court gave effect to it. The weight to be given to such statements must depend, in each case, on the circumstances in which the entries were originally made, and the corroboration they receive from extrinsic evidence.

Looking at the words used in the wajib-ul-arz in the present case, and assuming for the moment that it should be treated as a will (in order to take the point of view most favourable to the respondent, who was not represented by counsel at the hearing of this appeal), their Lordships have to consider whether it was the intention of Dhanraj to make the boy whom he had adopted his heir irrespective of adoption, or whether "the assumed fact of his adoption was not the reason and motive of the gift, and indeed a condition of it": *Fanindra Deb Raikat v. Rajeswar Dass.* (2) "The distinction," as Sir Richard Couch observes, in giving the judgment of this Committee in the case just quoted, "between what is descriptive only, and what is the reason or motive of a gift or bequest, may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances."

In the present case their Lordships have come to the conclusion that the words used are descriptive only. The right of Murli Dhar to inherit is based entirely on the fact that he was

(1) I. L. R. 19 Allah. 16.

(2) L. R. 12 Ind. Ap. 72, 89.

an adopted son, adopted seven years previously in virtue of a special custom which is thus stated: "A sharer shall be at liberty to adopt his sister's son or brother's son or daughter's son, whomsoever he may like, and after his death his adopted son will inherit his property." This is not a similar case to that of *Bireswar Mookerji v. Ardha Chunder Roy* (1), in which the will was made prior to adoption, and the bequest was to the lad by name, for reasons independent of adoption, though likely to lead to it; nor does it come within the ruling of this Committee in the case of *Nidhoomoni Debya v. Saroda Pershad Mookerjee* (2), in which it was held that there was a gift of his property by the testator to a designated person (the words being "I declare that I give my property to Koibullo whom I have adopted"), and that this gift was not dependent on the performance of certain ceremonies by his widows. In the present case their Lordships are of opinion that it was the intention of Dhanraj to give his property to Murli Dhar as his adopted son capable of inheriting by virtue of the adoption; and that as the adoption was invalid according to the general Hindu law, and not warranted by family custom, it gave no right to inherit, and the gift therefore had no effect upon the property.

The learned judges of the High Court appear to have been influenced in coming to their decision by the fact that, under the *wajib-ul-arz*, Murli Dhar was to get half the property, and that this was "more than a validly adopted son would get. This is an indication," they say, "that the adoption was not the reason or motive of the bequest." But what are the words used? "If, after this agreement a son is born to me, half the property will be received by him, and half by the adopted son." This is not a gift to Murli Dhar personally, but a division of the estate according to the family custom which Dhanraj was endeavouring to establish, and according to which the adopted son was to take an equal share with natural-born sons.

In the opinion of their Lordships the claim of Murli Dhar wholly fails, and they will humbly advise His Majesty that the appeal ought to be allowed, and that the decrees of the

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(1) L. R. 19 Ind. Ap. 101.

(2) L. R. 3 Ind. Ap. 253.

J. C. Subordinate Judge and the High Court ought to be reversed,
 1906 and the plaintiff's suit dismissed, with costs in both the lower
 MUSAMMAT Courts. The respondent must also pay the costs of this appeal.
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Solicitors for appellant: *Pyke & Parrott.*

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 March 21. WILKIE AND OTHERS DEFENDANTS.

Ex parte MOULVI MAHOMED IKRAMUL HUQ.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Practice—Appealable Amount—Sect. 596, C. C. P.

Where a plaintiff by his plaint claimed damages above the appealable amount, and the suit was dismissed without any determination as to the amount recoverable, and leave to appeal was refused by the High Court under s. 596, Civil Procedure Code, their Lordships granted special leave in that behalf.

THIS was a petition for special leave to appeal from a decree of the High Court dated July 22, 1905. Leave to appeal had been refused by the High Court on the ground that the appeal only related to damages, and the petitioner had not shewn under s. 596 of the Civil Procedure Code that the damages resulting necessarily amounted to Rs.10,000 or upwards. The petitioner now submitted that this order was erroneous, that he was entitled to appeal as of right, since by his plaint he had claimed Rs.30,000 and until by inquiry or otherwise it had been determined that he ought to receive a less amount that sum determined the appealable amount. The first Court had directed damages, but had not decided even the principle on which they should be assessed, while the High Court had dismissed the suit.

* *Present*: LORD MACNAGHTEN, LORD DAVEY, LORD ATKINSON, and SIR ARTHUR WILSON.

De Gruyther, for the petitioner, cited *Mohideen Hadjar v. Pitchey*. (1)

Their Lordships granted the petition.

Solicitors for the petitioner: *Watkins & Lempriere*.

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AND

WAZIR-UN-NISSA AND ANOTHER PLAINTIFFS.

ON APPEAL FROM THE COURT OF THE JUDICIAL
COMMISSIONER OF OUDH, LUCKNOW.

*Mortgage by conditional Sale—Construction—Regulation XVII. of 1806—
Ejectment by Mortgagor—Illegal Possession by Mortgagee—Effect of entry
in Wajib-ul-arz as to Custom.*

On September 28, 1866, a Mahomedan, since deceased, executed a deed of mortgage for Rs.2000, repayable without interest in five years, hypothecating the two villages in suit as security.

On May 11, 1871, he executed a second deed in favour of the mortgagee, reciting the former one, the approaching expiration of the period of five years without repayment, and an agreement to extend the period by a further thirty years upon terms that if the mortgagor should die within the fixed period then "after me the whole share of zamindari, . . . hypothecated as above shall be considered as a complete sale" to the mortgagee, who, on becoming entitled to and possessed of the property, should be bound to make provision thereout for the maintenance of certain male members of the mortgagor's family.

In a suit by the plaintiffs, as widow and daughter of the mortgagor, to eject the appellant claiming under the mortgagee, who had on the death of the mortgagor obtained possession and mutation of names as absolute purchaser:—

Held—(1.) That on the evidence the plaintiffs were widow and daughter as alleged;

(2.) That an entry in a wajib-ul-arz was insufficient by itself to establish a custom to exclude them from inheritance;

* *Present*: LORD DAVEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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(3.) That, on the true construction of the mortgage and Regulation XVII. of 1806, the property did not on the death of the mortgagor vest in the mortgagee as absolute purchaser ;

(4.) That he took possession as a trespasser and could be sued by the mortgagor in ejectment without offering to redeem.

APPEAL from a decree of the above Court (January 7, 1902), which set aside a decree of the District Judge of Fyzabad (February 4, 1898), and decreed the respondents' claim for possession of the eight annas share of two villages, the subject of suit, with mesne profits.

The suit was brought by Sughra Bibi (since deceased), the daughter of Raza Ali, Wazir-un-nissa, who was described as the widow of Razi Ali, and Sheikh Inayet-ul-lah, a purchaser from them of half of their rights in the property in suit, to recover the said eight annas share from Kazim Husain Khan and the appellant with mesne profits from date of suit to date of recovery.

The plaintiff alleged that Raza Ali was absolute owner thereof and died on January 2, 1881, leaving his daughter and widow as his heirs, having mortgaged the property on May 11, 1871, for thirty years without possession to Raja Tajammul Husain Khan, the predecessor of Kazim Husain Khan, by deed of mortgage by conditional sale of that date ; that Husain Khan on January 4, 1881, took possession thereof without foreclosure proceedings "contrary to the terms of the mortgage deed" and got mutation of names for the same in his own name as proprietor ; but that the appellant subsequently obtained possession thereof under a decree in a pre-emption suit dated November 4, 1884, to which the plaintiffs were not parties and by which they were not bound.

Kazim Husain Khan pleaded that he took possession under the deed of 1871, and that he was entitled to keep it for thirty years. The appellant denied that the respondent Wazir-un-nissa was ever married to Raza Ali ; and alleged that even she were she was a ghair kuf woman (not of the brotherhood), and that under the terms of the wajib-ul-arz relating to the property neither she nor her daughter could inherit to Raza Ali. He also contended that the transaction of May 11, 1871, became an absolute sale on Raza Ali's death, and that there was no necessity

for taking foreclosure proceedings. He pleaded that Husain Khan lawfully entered into possession, and that he himself lawfully obtained possession under a decree of Court on payment of Rs.4,400 and was not a trespasser; that the plaintiffs should have sued for redemption, and that the suit in its present form does not lie.

The transaction between Raza Ali and Tajammul Husain Khan, the predecessor of Husain Khan, was evidenced by two deeds, of September 28, 1866, and May 11, 1871. The first was an hypothecation of the property now in suit for Rs.2000 for five years, without any stipulation as to interest. It also provided for an absolute sale thereof on the mortgagor dying within the period of five years without having paid the debt, a contingency which did not happen. Towards the expiration of that period, without payment, the second deed, of 1871, was executed, the effect of which was to extend the period to thirty years from that year, again without stipulation as to interest. The deed contained the following provisions:—

“3. The third condition is, if, God forbid, within the fixed period I die, then, after me, the whole share of zamindari of villages Hasanpur Tanda and Asauna, as detailed below, in part and entirety, exclusive of Sadrapur, owned and possessed by me, and hypothecated as above, shall be considered as a complete sale in favour of Muhammad Tajammul Husain Khan, creditor, in lieu of the debt, and none of my sharers, representatives and heirs, shall, expressly or otherwise, have remaining any claim or right, and the said creditor thenceforward shall be taken as the real owner of the said property; and this very deed shall be considered as a complete sale-deed.

“4. The fourth condition is, after my death, when the said creditor becomes entitled to, and possessed of, the property covered by this deed of mortgage by conditional sale, as proprietor thereof, he shall have to maintain Hadi Husain, Mehdi Husain and Muhammad Husain, brothers of Kazi Zain-ul Abdin, residents of Sehali, on this scale:

“150 village bighas of land within the boundaries of village Hasanpur Tanda, and 11 houses of weavers, an occupied house and one-half of the grove, and the power of exacting suitable

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services from rayets (service tenants), residents of Hasanpur Tanda; you shall also have to give according to this recommendation, and this land and the houses of the rayets above noted shall remain for the three sons, each in equal shares, without any interference on the part of anybody.

"Therefore, these few words as a mortgage by conditional sale, complete, have been executed on a stamped paper of full value and registered under seal of the registration office, that it may be of use at the time of need."

On November 14, 1884, the appellant obtained a final decree for pre-emption against Husain Khan "on condition of his giving to the sons of Zain-ul Abdin or their representatives the provision made for them by Raza Ali."

Both the Courts below held in this suit that the deed of 1871 must be construed as a mortgage by conditional sale, and that Regulation XVII. of 1806 gave the mortgagor a year's grace from the time of the issue of a notice to him thereunder.

The District Judge dismissed the suit, finding on the evidence that Wazir-un-nissa was not the lawful wife, and that Sughra Bibi was not the legitimate daughter of Raza Ali; and that, if a lawful wife and a legitimate daughter, they were excluded from inheritance by custom. He decided the issue as to custom excluding a ghair kuf wife from inheritance on the ground that "there is no evidence that there were any inter-marriages between the families of Mahbub Ali (i.e., the father of Wazir-un-nissa) and Raza Ali or their relations prior to Raza Ali taking Musammat Wazir-un-nissa, and according, therefore, to the literal meaning of ghair kuf, and as it is understood by Hadi Husain, Mehdi Husain, and other witnesses, Musammat Wazir-un-nissa was a ghair kuf woman, that is, a woman belonging to a strange family. There have been no analogous instances cited in which such a woman has not succeeded to her husband's property. The wajib-ul-arz, however, which was signed by Raza Ali, is clear on the point that they cannot succeed, and that must be evidence of the custom until the contrary be proved. No evidence to the contrary has been given. Whether it is a hard and unfair custom is not for me to decide."

The appellate Court found in favour of Wazir-un-nissa's

marriage with Raza Ali, and the consequent legitimacy of Sughra Bibi. With regard to the custom, the judgment found that Wazir-un-nissa was not a ghair kuf wife; that if she were, the wajib-ul-arz did not establish a custom to exclude her, nor did the evidence. The custom, it says, "is recorded in the wajib-ul-arz of the village; but the wajib-ul-arz begins with the words ba ikrar, or by agreement, and it therefore cannot be presumed to be necessarily the record of an old and established custom. It does not purport to be more than an agreement between the parties who signed it, and there is no clear evidence of instances in which the custom was recognized and acted on."

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Cowell, for the appellant, contended that the intention and effect of the deed of 1871 were to vest an absolute title to the property in suit in Tajammul Husain Khan or his heir on the death of the mortgagor. The deed did not create a debt or a mortgage. Both were existing at its date, and the mortgagor of the earlier deed could by deed subsequent release the existing equity of redemption. There was no consideration other than the release for the extension of the period of mortgage by a further thirty years without interest. In the provision for the three nephews a kind of family settlement was provided of a portion of the property originally mortgaged; and neither Regulation XVII. of 1806 nor the Transfer of Property Act contemplated such a transaction in the light of a mortgage by conditional sale. So far as this deed was one of hypothecation there was no sale, and so far as it was a sale there was no condition as to payment of debt. It did not, therefore, fall within s. 58, clause 3, of the Act. It fell within s. 98, and was to be construed according to the intention of the parties, freed from the technical rules applicable to a mortgage by conditional sale. If the transaction was one of redeemable mortgage the only remedy is that given by Regulation XVII. of 1806, which was in force at its date, or by the Transfer of Property Act, which regulated the procedure to be adopted at the time the suit was brought. The respondents have not followed that remedy nor offered to redeem, but have brought ejectment, to

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which they are not entitled, either under the contract, the Regulation, or the Act. Reference was made to *Sayyid Mansur Ali Khan v. Sarju Prasad* (1) ; *Bhagwan Sahai v. Bhagwan Din*. (2) It was also contended on the evidence that the plaintiffs did not represent Raza Ali, for there had been no marriage ; otherwise the *wajib-ul-arz*, which had been signed by Raza Ali, proved a custom to exclude the wife as *ghair kuf*, and no evidence had been given to the contrary.

De Gruyther, for the respondents, contended that the evidence established that Wazir-un-nissa was the lawfully married wife of Raza Ali, and that Sughra Bibi was his legitimate daughter. The custom relied upon for excluding them was not proved. In the first place it was doubtful what was the true meaning of *ghair kuf*. If it meant, as several of the witnesses said, that a woman was *ghair kuf* to a man if there had been no previous inter-marriage between the families, there could be no marriage at all except where a previous affinity existed, which would be an unreasonable and impossible custom. The entry in the *wajib-ul-arz* would, even if admissible, be insufficient evidence by itself of custom, and no instances had been given. The onus was on the appellant to prove it, and he could not use the entry as shifting the onus to the respondents of giving instances to the contrary. With regard to the effect of the deed of 1871, it was recited to be a mortgage by conditional sale, and that was the intention of the parties. It was governed by Regulation XVII. of 1806 : see Act XVIII. of 1876, ss. 5 and 10, and Macpherson on Mortgages, 7th ed. p. 293. It was contended that no action of ejectment would lie, and that the proper remedy was redemption ; but see *Forbes v. Ameeroonissa Begum*. (3) Both Courts have rightly held that possession was illegally taken by the mortgagee, who ought to have followed the procedure prescribed by the Regulation.

Cowell, replied, referring to Limitation Act (XV. of 1877), Sched. II., art. 116, as to taking possession in breach of contract, and to *Rani Lekraj Kuar v. Mahpal Singh* (4), as to the effect of the *wajib-ul-arz*.

(1) (1886) L. R. 13 Ind. Ap. 113.

(2) (1890) L. R. 17 Ind. Ap. 98.

(3) (1865) 10 Moo. Ind. Ap. 340, 348.

(4) (1879) L. R. 7 Ind. Ap. 63, 70.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The suit out of which this appeal arises was instituted on August 18, 1890. The plaintiffs were Sughra Bibi and Wazir-un-nissa (claiming to be daughter and widow, and as such co-heiresses, of one Raza Ali, deceased) and Inayet-ul-lah, an assignee from the ladies of a share of their inheritance. The defendants were Kazim Husain Khan and the present appellant, Hub Ali, whose connection with the matters in dispute will be explained later.

The case presented on behalf of the plaintiffs was that about 1856 or 1857 Raza Ali, whose home was then at Seota, was lawfully married to Wazir-un-nissa, and resided with her there for some time, and that Sughra Bibi was the legitimate daughter of that marriage; that subsequently Raza Ali migrated to Tanda, whither he was shortly followed by his wife and daughter, who lived with him there until his death, which took place on January 2, 1881; and that they, as such widow and daughter, were his lawful heirs according to Mahomedan law. It was further alleged that Raza Ali, at the time of his death, was the owner of an eight annas share in the villages Hasanpur Tanda and Asauna; and that on May 11, 1871, he had mortgaged that property by deed of conditional sale to Raja Tajammul Husain Khan for a period of thirty years, without possession, to secure a principal sum of Rs.2000 without interest. It was then said that on January 4, 1881, immediately after the death of Raza Ali, the defendant Kazim Husain Khan, the representative of the original mortgagee, without any foreclosure or other legal proceedings, procured mutation of names for the mortgaged property in his own favour, and shortly afterwards entered into possession; and that the other defendant had obtained a decree in a pre-emption suit against Kazim Husain Khan, to which the plaintiffs were no parties, and acquired possession of the property. On the basis of the case thus indicated the plaintiffs asked for a decree for possession of the property and mesne profits.

In answer to this case the defendant Hub Ali, now appellant, denied that Wazir-un-nissa was the wife, or Sughra Bibi the daughter, of Raza Ali. He alleged, secondly, that, if there had

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been a marriage, both wife and daughter were excluded from inheritance under the terms of the *wajib-ul-arz*, on the ground that the wife was a *ghair kuf* woman. It was set up, thirdly, that by the terms of the alleged mortgage the property vested absolutely in the mortgagee on the death of Raza Ali, and that the mortgagee, and after his death his representative, was entitled to take possession without any legal proceedings. It was said, lastly, that the plaintiffs ought, upon their own view of the case to have sued for redemption and could not sue for possession. These were the four questions discussed before the Courts in India, and again argued on the appeal before their Lordships.

The District Judge dismissed the suit. He held that the marriage of Wazir-un-nissa was not proved. He held, further, that, if a marriage did take place, the wife was *ghair kuf* within the meaning of the *wajib-ul-arz*, and that therefore mother and daughter were excluded from inheritance. On the other hand, he thought that the document called a mortgage by conditional sale was really so; that the mortgagee or his representative had no right except to have recourse to foreclosure proceedings; and that, in taking possession as he did, he was a trespasser, against whom a suit for possession might properly lie.

In the Court of the Judicial Commissioner it was held that Wazir-un-nissa was the lawfully married wife of Raza Ali, and Sughra Bibi their legitimate daughter; that the alleged custom, based upon the *wajib-ul-arz*, to exclude a *ghair kuf* wife and her daughter was not proved, and that if it were proved, Wazir-un-nissa was not a wife of that class. It was further held, in concurrence with the first Court, that the document of May 11, 1871, was a mortgage by conditional sale, and that the entry by the representative of the mortgagee was a mere trespass; and accordingly a decree was given to the plaintiffs for possession and mesne profits.

Their Lordships agree with the conclusions arrived at by the Court of the Judicial Commissioner on all points.

As to the fact of the marriage, it was spoken to by the Qazi, who says he performed the ceremony, and by four other witnesses who profess to have been present. Those witnesses were disbelieved by the first Court, for reasons which are not

very convincing—reasons which are quite sufficient to demand an examination of the evidence in support of the marriage as a whole and with care, but not sufficient to justify the summary rejection of the testimony of the witnesses in question. The next branch of the evidence in support of the marriage relates to the position and treatment of the alleged wife and of her daughter. With regard to this it seems clear that from the time of the alleged marriage Wazir-un-nissa lived with Raza Ali as his wife down to his death. She and her daughter lived in the inner apartments of the house, whereas a mistress who was kept by Raza Ali lived at the same time in the outer apartments. As to the amount of social intercourse between the two ladies and others more or less connected with Raza Ali's family, the evidence is loose, as is usual in such cases. The daughter, Sughra Bibi, whose parentage is not disputed, was married by her father, with considerable ceremony and publicity, to a man of respectable family. Upon the death of Raza Ali, the Patwari, in his official report, declared that Wazir-un-nissa, his wife, and Sughra, his daughter, were his heirs. The present appellant himself, in his evidence on a former occasion, describes Wazir-un-nissa as the wife of Raza Ali.

From all this their Lordships think the proper inference is that the marriage did take place; and it follows that the widow and daughter were heirs of Raza Ali, under the Mahomedan law, unless there was something special to exclude them.

The special circumstance relied upon as excluding them from the inheritance was that Wazir-un-nissa (it was said) was a ghair kuf wife, and that she and her daughter were excluded by custom. Apart from the wajib-ul-arz, it appears to their Lordships that there is absolutely no evidence of any custom on the subject. There is simply a series of statements by witnesses, as to what is usual and what they consider becoming, with reference to inter-marriages between different groups of Mahomedan families, but there is no instance produced of anybody having been excluded from inheritance in consequence of a marriage not in accordance with the witnesses' views of propriety. The District Judge based his finding upon a statement in the wajib-ul-arz of the village of Hasanpur Tanda. That document,

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under the heading "Transfer of Property and Right of Inheritance," says :

"A married wife belonging to a (ghair kuf) different caste, and an unmarried wife, or their descendants will, provided they bear good conduct, be entitled to maintenance according to their status, and they will not be entitled to any share whether the property be partitioned or unpartitioned."

That document bears the signatures, amongst others, of Raza Ali and the present appellant ; and the fact that Raza Ali signed it makes it admissible, for what it is worth, against those who are claiming as his heirs. But the Judicial Commissioner has pointed out that the document commences with words meaning "by agreement," so that it does not purport to be a record of immemorial custom. The learned counsel for the first respondent drew attention to the fact that, though the parties were all Mahomedans, the rules of inheritance laid down are really based, not upon Mahomedan, but on Hindu law. In the absence of other evidence in support of the alleged custom, their Lordships are of opinion that the entry in the *wajib-ul-arz* is insufficient to establish it. They further agree with the Judicial Commissioner that, supposing such a custom to be established, the case of *Wazir-un-nissa* has not been shewn to fall within it. Raza Ali was by family a Syed, *Wazir-un-nissa* was by family a Sheikh, and the social position of her father is stated to have been good. If any conclusion can be drawn from the vague and conflicting statements of the witnesses, it appears to their Lordships to be that such a marriage would not fall within the ban implied by the term "ghair kuf."

The nature of the mortgage transaction and its legal effect have next to be considered. On September 28, 1866, Raza Ali executed a deed of mortgage in favour of *Tajammul* for Rs.2000, repayable in five years, hypothecating the two villages in question as security, and providing in paragraph 3 that if "I die within the fixed period without paying the said loan then after me the whole share of my zamindari which has been hypothecated, shall be considered as a complete sale to *Tajammul* . . . in lieu of the debt." The same paragraph describes the deed as a "mortgage deed by conditional sale."

On May 11, 1871, the mortgagor executed a second deed in favour of the mortgagee. This deed recited the former mortgage. It recited that the time for payment had nearly expired, and the mortgagor could not pay off the debt, and that at his request the mortgagee had extended anew the period for payment to thirty years from the next year, upon terms which are stated. First, the mortgagor pledged himself for payment at the prescribed time. Thirdly, it was agreed that if the mortgagor should die within the fixed period, then "after me the whole share of zamindari . . . hypothecated as above shall be considered as a complete sale" to Tajammul. The fourth condition provided that when the creditor became entitled to and possessed of the property, he should be bound to make provision for the maintenance of certain male members of the family to which the mortgagor belonged.

At the time when the mortgage of May 11, 1871, was entered into, and also at the time when the representative of the mortgagee took possession of the property, after the death of Raza Ali, the law governing the matter was Bengal Regulation XVII. of 1806; the Transfer of Property Act had not passed.

Their Lordships think it clear, as did both the Courts in India, that the mortgage of 1871 was in substance, what it describes itself as being, a mortgage by way of conditional sale. For the appellant it was suggested that the document might be read as containing two separate and distinct transactions—first, a mortgage by mere hypothecation, which was not a conditional sale, and, secondly, a conditional sale which was not a mortgage. This, in their Lordships' opinion, would be to apply an artificial and illegitimate method of construction to a document which can be naturally, and without difficulty, construed and applied as a whole.

Such being the nature of the transaction, the rights of the parties under the Regulation admit of no doubt. The mortgagee or his representative had the right to take legal proceedings with a view to foreclosure; and that foreclosure he could have obtained, if, after the proper steps had been taken, the representatives of the mortgagor had failed to redeem within the time limited for that purpose by the terms of the Regulation. But there was no right to take possession of the property without the proceedings

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prescribed by law. In entering as he did, therefore, the representative of the mortgagee was a mere trespasser, and the heirs of the mortgagor are entitled to sue him in ejectment as such.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs.

Solicitors for appellant: *Barrow, Rogers & Nevill.*

Solicitors for respondent: *Watkins & Lempriere.*

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DHANIPAL DAS AND ANOTHER PLAINTIFFS;
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RAJA MANESHAR BAKHSH SINGH DEFENDANT.

ON APPEAL FROM THE COURT OF THE JUDICIAL
COMMISSIONER OF OUDH.

Oudh Land Revenue Act, 1876, c. viii.—Construction—Rights of Disqualified Proprietor—Right to contract Debts—Indian Contract Act, s. 16—Act VI. of 1899, s. 2—Bond set aside—Decree for Loan and reasonable Interest.

According to the true construction of c. viii. of the Oudh Land Revenue Act, 1876, there is no prohibition, either express or necessarily implied, of a disqualified proprietor contracting debts or borrowing money. But he may not, without the sanction of the Court, create any charge upon his property.

In an action upon a bond executed by a disqualified proprietor, without the sanction of the Court:—

Held, that he was not incompetent to execute it, but that the position of the parties was such that the lender was “in a position to dominate the will” of the borrower within the meaning of s. 16 of the Indian Contract Act as amended by s. 2 of Act VI. of 1899; and that he used that position so as to obtain an unfair advantage.

There having been concurrent findings of fact that the compound interest stipulated was unconscionable, and also that simple interest at 18 per cent. per annum would not have been high:—

Held, that the bond sued on must be set aside, but that there should be a decree for the principal sums actually lent, with simple interest at that rate.

APPEAL from a decree of the above Court (June 3, 1902), modifying a decree of the Subordinate Judge of Sitapur (January 31, 1901).

* *Present*: LORD DAVEY, LORD ROBERTSON, LORD ATKINSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

The questions involved in the appeal under the circumstances stated in their Lordships' judgment are : (1.) whether the terms of the bond in suit were hard and unconscionable ; (2.) whether in the circumstances it was obtained by the plaintiff from the respondent under undue influence within the meaning of s. 16 of the Indian Contract Act, 1872, as amended by s. 2 of Act VI. of 1899, which came into operation on May 1, 1899 ; and (3.) whether, if it was, the respondent had ratified and confirmed it prior to suit.

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Sect. 2 of Act VI. of 1899 is as follows : " Sect. 16 of the Indian Contract Act, 1872, is hereby repealed, and the following is substituted therefor, namely—16. (1.) A contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

" (2.) In particular, and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

" (a) when he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other, or

" (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

" (3.) Where a person who is in a position to dominate the will of another enters into a contract with him and the transaction appears on the face of it, or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other. Nothing in this sub-section shall affect the provisions of s. 111 of the Indian Evidence Act, 1872.

" Illustration.

" (c) A. being in debt to B., the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B. to prove that the contract was not induced by undue influence."

This suit was brought by Auseri Lal, predecessor of the

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appellants, against the respondent, Taluqdar of Mallanpur, whose estate had been, by order of the local Government dated August 6, 1886, made under Act XVII. of 1876, brought under the management of the Court of Wards. The bond sued upon was dated February 4, 1889.

The pleas were that the bond was inoperative in law, having been executed at a time when the estate was under the management of the Court of Wards, and that, if enforceable, it was voidable on the ground of undue influence, or was executed under circumstances in which a Court of Equity would not enforce it according to its terms.

The Subordinate Judge held that the case was not one of fraud or undue influence, but of inequitable dealing. He decided to interfere in the enforcement of the hard terms of the contract, and accordingly allowed simple interest at 18 per cent., but not compound interest.

The Court of the Judicial Commissioner affirmed the finding of the Subordinate Judge that the contract was not void in law because it was executed while the respondent's property was under the management of the Court of Wards, and also that the bargain between the parties was a hard, and, they added, unconscionable one. The judges of the Court differed from him on the question of the applicability of s. 16 of the Indian Contract Act, 1872 as amended to the case. They held that in the circumstances it was on the plaintiff to shew that the bond was not executed under undue influence, that he had not done so, that the transaction was a voidable one, that the respondent had not ratified it, and that it should be set aside. They accordingly set aside the bond of January 13, 1892, and, granting equitable relief to the respondent, made a decree in favour of the plaintiff for the sum of Rs.4500, with interest from February 4, 1889, and for the sum of Rs.1250, with interest from January 13, 1892, at the rate of 6 per cent. per annum to the date of payment, giving him proportionate costs and directing each party to pay his own costs as to the rest of the claim.

W. C. Bonnerjee, for the appellant, contended that the terms of the bond were not hard and unconscionable; nor was there

any undue influence within the meaning of the above sections. Even if the contract were voidable, the evidence shewed that the respondent had ratified it at a time when no question of undue influence had or could have arisen. He contended that the cases of *Earl of Aylesford v. Morris* (1), *Beynon v. Cook* (2), *Nevill v. Snelling* (3), *Fry v. Lane* (4), and *Kamini Soondari Chowdhurani v. Kali Prosunno Ghose* (5), on which the Courts below relied, were not applicable to this case. He referred to *Webster v. Cook* (6); *Bennet v. Bennet* (7); *Wilton & Co. v. Osborn*. (8)

De Gruyther, for the respondent, contended that the bond was invalid in law, having been executed when the respondent was disqualified from entering into a contract of the kind, resulting necessarily in a charge on his estate, which was under the management of the Court of Wards, and of which he was the disqualified proprietor. He referred to the reasons given in the preambles to Regulations X. of 1793 and LII. of 1803; also to Act XIX. of 1873, c. vi. (Court of Wards) and s. 193; to Act XVII. of 1876, ss. 162, 173, and 174; *Mohummud Zahoor Ali Khan v. Mussumat Thakooranee Rutta Koer* (9); *Rai Balkrishna v. Mussumat Masuma Bibi* (10); *Waghela Rajsanji v. Shekh Mashudin*. (11) He contended on the evidence that the consent of the respondent had not been obtained by undue influence, but under circumstances in which all the terms of the transaction should be strictly enforced. Upon the question of their being unconscionable he referred to *Rajah Mokham Singh v. Rajah Rup Singh* (12); *Lalli v. Ram Prasad* (13); *Madho Singh v. Kashi Ram* (14); *Kamini Soondari Chowdhurani v. Kali Prosunno Ghose*. (5)

Counsel for the appellant was not heard in reply.

The judgment of their Lordships was delivered by

LORD DAVEY. The original plaintiff Auseri Lal was the head of a joint Hindu family. He is now deceased, and the present

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(1) (1873) L. R. 8 Ch. 484.

(2) (1875) L. R. 10 Ch. 389.

(3) (1880) 15 Ch. D. 679.

(4) (1888) 40 Ch. D. 312.

(5) (1885) L. R. 12 Ind. Ap. 215.

(6) (1867) L. R. 2 Ch. 542, 548.

(7) (1876) 43 L. T. 246, n.

(8) [1901] 2 K. B. 110.

(9) (1867) 11 Moo. Ind. Ap. 468.

(10) (1882) L. R. 9 Ind. Ap. 182.

(11) (1887) L. R. 14 Ind. Ap. 89, 96.

(12) (1893) L. R. 20 Ind. Ap. 127.

(13) (1886) Ind. L. R. 9 Allah. 74.

(14) (1887) Ind. L. R. 9 Allah. 228.

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appellants, as the surviving members of the family, have been substituted for him on the record. Auseri Lal, on behalf of the family, formerly carried on the business of a banker and money-lender in the district of Sitapur, in Oudh; and in the course of his business he had, previously to the transactions which are the subject of this appeal, lent money to the respondent, who was and is the Taluqdar of Mallanpur, in the same district.

In the year 1886 the respondent, being then largely involved in debt, was, on his own application, declared by the Chief Commissioner of Oudh a disqualified proprietor under the provisions of the Oudh Land Revenue Act, 1876, and his property was placed under the charge of the Court of Wards on August 12 in that year. The respondent's property remained under such charge until some time in the month of July, 1898, when it was released to him, and he resumed possession. While the estate was under its charge the Court of Wards made an allowance of Rs.1250 per mensem to the respondent for the maintenance of himself and his family.

On February 4, 1889, the respondent, without the sanction of the Court of Wards, borrowed from Auseri Lal the sum of Rs.4500, and executed in his favour a bond which was duly registered for that amount stipulating that he would repay the amount in two years, with interest at the rate of Rs.2 per mensem, payable half-yearly out of his allowance of Rs.1250 per mensem, and stipulating further that in case default was made in the payment of interest he would pay compound interest at the same rate until the amount secured by the bond was fully paid off and satisfied. The respondent did not pay any sum either for principal or interest due on this bond, and after it had become due negotiations were apparently opened by his officers on his behalf with the plaintiff for a further advance at a lower rate of interest. In the result an account was settled between the respondent and Auseri Lal of the amount due on the bond for Rs.4500, and it was found that that sum, with interest and compound interest at the rate of 2 per cent. per mensem up to January 13, 1892, came up to Rs.8750. On the last-mentioned date Auseri Lal advanced to the respondent the further sum of Rs.1250, and the latter without the sanction of the Court of

Wards executed in favour of the former a bond, also registered, for the total sum of Rs.10,000, stipulating that he would repay the amount in seven years, with interest at the rate of Rs.1. 8 per cent. per mensem payable half-yearly, and stipulating further that in default of payment of interest on due dates he would pay compound interest at the same rate, and that he would pay interest and compound interest on the amount secured by the bond until it was fully paid off and satisfied.

The present suit was brought on the bond of January 13, 1892. The defence is, first, that the respondent, being at the date of the bond a disqualified proprietor, had no power under the Act to borrow money without the sanction of the Court of Wards; and, secondly, that the bargain was an unconscionable one, and procured by the exercise of undue influence within the meaning of s. 16 of the Indian Contract Act, 1872, as amended by s. 2 of Act VI. of 1899.

The first point depends on the construction and effect of the group of sections (161 to 177) in the Oudh Land Revenue Act, 1876, intituled "Chapter VIII. Court of Wards." Sect. 162 defines the persons who shall be held to be disqualified to manage their own estates, including (g) persons declared by the Chief Commissioner on their own application to be disqualified. By s. 166 the jurisdiction of the Court of Wards extends to the care and education, and to the management of the property, of the persons subject thereto. By s. 167 the Court of Wards may appoint managers of the property of disqualified proprietors, and if such proprietors be minors, idiots, or lunatics, may appoint guardians for the care of their persons. By s. 170 the manager appointed by the Court of Wards may collect the rents of the land entrusted to him as well as all other money due to the disqualified proprietor, and may, subject to the control of the Court, grant or renew leases of a limited duration. The more important sections are 173 and 174.

"173. Persons whose property is under the superintendence of the Court of Wards shall not be competent to create without the sanction of the Court any charge upon or interest in such property or any part thereof.

"174. No such property shall be liable to be taken in execution

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of a decree made in respect of any contract entered into by any such person while his property is under such superintendence."

From a perusal of the group of sections above referred to their Lordships are of opinion that it was not intended to interfere with the personal status or rights of an adult disqualified proprietor who is neither idiot nor lunatic, except as regards the management of his property or anything expressly prohibited. There is no prohibition of a disqualified proprietor contracting debts or borrowing money, and it is contemplated in s. 174 that such a person may enter into contracts which, but for the provisions of that section, might result in his property being taken in execution. But the disqualified proprietor may not without the sanction of the Court create any charge upon his property. It was argued, however, that to allow a disqualified proprietor to contract debt would enable him by anticipation to waste the estate when restored to his care, and so defeat the objects of the Act, and would therefore be inconsistent with the other provisions and purposes of the Act. This argument would have been a cogent one for the consideration of the Legislature in framing the Act. But their Lordships think that there is no necessary implication of a prohibition to contract personal obligations, and they are not entitled to read into the Act a curtailment of the proprietor's personal rights which they do not find there.

Their Lordships were referred to the case of *Mohummud Zahoor Ali Khan v. Mussumat Thakooranee Rutta Koer* (1), in which it was said that Sir James Colville, delivering the judgment of this Board, had assumed that a disqualified landowner whose estate had been placed under a manager by the Court of Wards under Bengal Regulation LII. of 1803 was incapacitated from contracting debts, as had in fact been decided by the Sudder Dewanny Court at Agra. It was not, however, necessary to consider the point, as their Lordships held that the necessary formalities had not been complied with for making the person in question a disqualified proprietor, and gave judgment for the amount due on the bond. There was therefore no decision on the point. In the case of *Rai Balkrishna v. Mussumat Masuma Bibi* (2) the language of the marginal note is misleading, for the only

(1) 11 Moo. Ind. Ap. 468.

(2) L. R. 9 Ind. Ap. 182.

question was whether the proprietor was competent to convey the property by mortgage or sale while the estate was under the management of the Court of Wards, and nothing was decided or said on the question now under consideration. Their Lordships agree with the decision come to by both Courts below that the respondent was not incompetent to execute the bond in suit.

On the other point the learned counsel for the respondent admitted that the case rested entirely on the question whether the interest charged in the two bonds was reasonable. The Subordinate Judge held that the rate of interest was high in this sense, that compound interest was charged. Simple interest at Rs.1. 8 per cent. per mensem he thought would not have been high. He held that the amended s. 16 of the Indian Contract Act did not apply to the case, but on a mistaken view of certain English authorities he was of opinion that wherever a transaction or contract appears to a Court of Equity to be a "hard bargain" it cannot be enforced in its "entirety;" and, holding that this was a "hard bargain," he said: "I do not mean that the present is a case of actual fraud or undue influence, but it is certainly a case of inequitable dealing." In the result he decreed the claim for Rs.10,000 principal and simple interest at 18 per cent. per annum.

In the Court of the Judicial Commissioner it was held that there was a presumption that there had been on the part of the then plaintiff an unconscientious use of power arising from the circumstances and conditions of the contracting parties. In other words, the respondent's consent to the transactions was caused by undue influence within the meaning of the amended s. 16 of the Indian Contract Act, and the transaction was therefore voidable. Accordingly the Court gave the plaintiff a decree for Rs.4500 (the principal money under the first bond), with interest at 6 per cent. a year from February 4, 1889, and Rs.1250 (the additional advance on the second bond), with interest at the same rate from January 13, 1892.

Auseri Lal himself was advanced in years at the respective dates of the two bonds in suit, and states that his nephew Madho Ram, one of the present appellants, looked after his affairs. Madho Ram's evidence was extremely unsatisfactory.

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He professed not to remember what took place when the bonds were executed, and not to know what was the Court of Wards or what the word "Court" meant. This evidence does not assist the appellants' case in any way. The only other evidence contained in the record is that of the respondent himself. He states that his allowance from the Court of Wards was not sufficient to enable him to pay the interest on the bonds, and the only property from which he could satisfy his debt was the jewellery belonging to the females of his family, the value of which, however, he did not know. He further stated that this jewellery had been pledged to Auseri Lal some seven or eight years ago, though whether before or after the deed of 1892 he could not say, and that it had not been redeemed. He stated that no fraud or undue influence was practised upon him on taking the deed of 1889 or that of 1892.

The fair result of this evidence is that the respondent, through his improvidence, was in urgent need of money, and owing to his estate being under the care of the Court of Wards he was in a helpless position. There was no fraud in the matter, and no pressure was put upon the respondent by Auseri Lal or his agents to induce him to accept the conditions offered to him; and indeed the fact of the interest being reduced on the second transaction from 24 per cent. to 18 per cent. points to some negotiations having taken place between them. But it must be taken that the respondent was compelled by his circumstances to accept the terms which were offered to him both in 1889 and 1892.

Their Lordships are of opinion that although the respondent was left free to contract debt, yet he was under a peculiar disability and placed in a position of helplessness by the fact of his estate being under the control of the Court of Wards, and they must assume that Auseri Lal, who had known the respondent for some fifty years, was aware of it. They are therefore of opinion that the position of the parties was such that Auseri Lal was "in a position to dominate the will" of the respondent within the meaning of the amended s. 16 of the Indian Contract Act. It remains to be seen whether Auseri Lal used that position to obtain an unfair advantage over the respondent.

The Subordinate Judge was wrong in deciding the case in accordance with what he supposed to be English equitable doctrine. He ought to have considered the terms of the amended s. 16 only. He also mistook the English law. Apart from a recent statute an English Court of Equity could not give relief from a transaction or contract merely on the ground that it was a hard bargain, except perhaps where the extortion is so great as to be of itself evidence of fraud, which is not this case. In other cases there must be some other equity arising from the position of the parties or the particular circumstances of the case. But, although he was wrong in the reasons for his judgment, the Subordinate Judge may be right in his findings of fact. He finds that simple interest at Rs.1. 8 per cent. per mensem (18 per cent. per annum) would not have been high, and their Lordships do not find that the Court of the Judicial Commissioner expressed any dissent from this finding. On the other hand, their Lordships think that the Subordinate Judge must be taken to have found that the charging of compound interest in the circumstances was unconscionable, and they understand the Court of the Judicial Commissioner also to have so found. Their Lordships are not disposed to differ from a concurrent finding of the Courts below, even if it be not strictly a finding of fact. The result is that their Lordships must hold that the lender used his position to demand and obtain from the respondent more onerous terms than were reasonable, and the bond sued on must be set aside. Their Lordships, however, think that in the particular circumstances of the present case justice will be met by allowing the appellants simple interest at 18 per cent. per annum on the sums advanced by Auseri Lal throughout.

Their Lordships agree with the Court of the Judicial Commissioner that the letters written by the respondent or his agent, which were referred to by Mr. Bonnerjee, do not amount to a ratification of the transaction.

Their Lordships will therefore humbly advise His Majesty that the decree of the Court of the Judicial Commissioner of Oudh, dated June 3, 1902 (except so far as it directs that the bond sued on be set aside, and that the costs of the original suit

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be paid by the defendant to the plaintiff), be varied, and as varied stand as follows (that is to say), that it be ordered that the respondent pay to the appellants the sum of Rs.4500, with simple interest at the rate of 18 per cent. a year from February 4, 1889, to the date of payment, and the sum of Rs.1250, with simple interest at the same rate from January 13, 1892, to the date of payment, with proportionate costs on the amount decreed to be settled by the Judicial Commissioner in case of difference, and that as to the rest each party bear his own costs. There will be no costs of this appeal.

Solicitors for appellants: *Barrow, Rogers & Nevill.*

Solicitors for respondent: *T. L. Wilson & Co.*

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MANOHAR LAL APPELLANT;
AND
JADU NATH SINGH AND OTHERS RESPONDENTS.

ON APPEAL FROM THE COURT OF THE JUDICIAL
COMMISSIONER OF OUDH.

Civil Procedure Code, s. 462—Compromise on behalf of a Minor in a Suit—Practice.

Civil Procedure Code, s. 462, which prohibits a compromise on behalf of a minor by his guardian in a suit without the leave of the Court, is not complied with unless it is shewn that leave was formally given after the attention of the Court had been directly called by petition or otherwise to the fact that the minor was a party thereto. In the absence of evidence to that effect the compromise must be declared not binding on the minor, who should be remitted to his original rights.

APPEAL from a decree of the Judicial Commissioner of Oudh (May 26, 1908), modifying a decree of the Subordinate Judge of Fyzabad (June 28, 1901).

The main question decided in the appeal was as to the validity and effect of two decrees made by the Court of the Subordinate

* *Present*: LORD MACNAGHTEN, SIR ANDREW SCOBLE, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

Judge of Fyzabad on March 12, 1896, giving effect to compromises of even date.

The circumstances which led to those decrees were shortly as follows :—

One Dalthamman Singh was the owner of an estate known as Bhandsari, which comprised several villages. On his death he left behind him a widow and two illegitimate sons. The widow had possession of the estate, and on December 17, 1888, executed a deed of gift for consideration of the whole of the estate to five donees (one of them being the respondent Jadu Nath Singh, a minor). All the donees were descended from the same common ancestor as Dalthamman Singh, and represented different branches of the family. Each of the donees was placed in possession of his share. Jadu Nath Singh was a minor, and lived with his father, Surat Singh.

The two illegitimate sons of Dalthamman Singh claimed to be entitled to a reversion of the whole estate subject to the life interest of the widow, basing their title on a will alleged to have been executed by Dalthamman Singh on February 22, 1876. They sold their reversion in one of the villages, namely, Jamnipur, to one Inderjit Singh for Rs.4000 by deed executed on October 19, 1888. This led to a claim to pre-empt advanced by Bishu Nath Singh and Mehpal Singh, who were co-sharers in the village. After litigation, a decree granting the right claimed was passed in their favour on September 22, 1890, conditional on payment by them of the sum of Rs.8000 on or before December 22, 1890. On that date the appellant Manohar Lal lent Rs.6000 to the pre-emptors, who executed a mortgage in his favour of the village of Jamnipur. The object for which the money was borrowed was stated in the deed to be "for the purpose of paying the purchase-money of 13 annas 6 pie, odd share in village Jamnipur in respect of which a decree for pre-emption has been passed."

As further security for the repayment of the said sum with interest at the rate of 24 per cent. per annum, another mortgage of the villages of Bhandsari and Gangapur was executed by all the donees of Dalthamman Singh's share. In executing the mortgage Surat Singh purported to act as guardian and next friend of his minor son.

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On the same day a third mortgage was executed by the same donees, Surat Singh again acting for Jadu Nath Singh. A sum of Rs.5000 was advanced at 24 per cent. per annum interest, "for the purpose of payment to Bishu Nath Singh and Mehpal Singh in satisfaction of their pre-emption decree obtained in respect of 13 annas 6 pie odd share in village Jamnipur and for other necessities." The properties mortgaged were the villages of Balrampur and Gonwan Makrand. On November 19, 1895, Manohar Lal instituted two suits to foreclose the mortgages in the Court of the Subordinate Judge of Fyzabad. The first suit was based on the mortgage of Jamnipur, Bhandsari and Gangapur, and the second suit on the mortgage of Balrampur and Gonwan Makrand. Both suits were settled by compromises. The defendants confessed judgment for the amount claimed and costs, and agreed to pay the whole amount with compound interest, calculated at the rate of 10 per cent. per annum, by instalments, with power to the mortgagee to foreclose on failure by the mortgagors to pay any instalment.

In pursuance of these compromises decrees were made on March 12, 1896; and on January 28, 1899, on default by the mortgagors, decrees absolute for foreclosure were made.

On March 9, 1899, Jadu Nath, by his mother as next friend, sued for a cancellation of the said compromises and decrees, on the ground that they were made without the sanction of the Court, and under circumstances in which the minor's rights ought not to be prejudiced.

Both Courts held that the compromises, not having been made with the sanction of the Court were not binding on the minor, nor were the decrees binding which were passed in pursuance thereof; the final decree being that they "be set aside in their entirety, the result of which will be that those suits will have to be decided afresh."

W. C. Bonnerjee, for the appellant, contended that the compromises and decrees were binding on the minor. Though no formal order of leave was drawn up, yet the Subordinate Judge accepted the compromises with the full knowledge that the respondent was a party to the suits and to the preceding

transactions, all of which had been before him in evidence and that he was a minor. They should accordingly be taken to have been made with the leave of the Court within the meaning of s. 462 of the Civil Procedure Code; for such leave was implied in his acceptance of the compromises as the bases of his decrees. The whole decrees ought not to have been set aside. Sect. 544 says there must be common ground against all the defendants before that can be done. The respondent was only entitled to relief as regards his own interest.

De Gruyther, for the respondent, contended that the compromises and decrees were not binding on him, for that leave had been assumed by the guardian rather than judicially granted by the Court. He agreed that the result would be that he should be remitted to his original rights.

Bonnerjee replied.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The Code of Civil Procedure, s. 462, provides that: "No next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian." It was argued on behalf of the appellant that the exigencies of that provision had been complied with in this case, inasmuch as it appeared that the minor (the first respondent), who was a party to the compromises in question, was described in the title of the suit as a minor suing "under the guardianship of his mother," and the terms of the compromises were, of course, before the Court. In the opinion of their Lordships that is not sufficient. There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromises, and it ought to be shown, by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained. This was the principal question argued before their Lordships, and on it the appellant fails.

The other question had reference to the terms of the decree pronounced by the Court of the Judicial Commissioner on the minor's appeal to that Court. It appears to their Lordships that

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the terms of that decree are far too wide. The decree orders that the compromises and decrees in the foreclosure suit (which were in question in this suit) be set aside "in their entirety," and goes on to declare that the result would be that those suits would "have to be decided afresh." Their Lordships think (and indeed the learned counsel on both sides agree) that it will be quite sufficient if there is a declaration that the compromises and decrees are not binding upon the minor, and that he is remitted to his original rights.

Their Lordships will therefore humbly advise His Majesty that the decree in the minor's appeal to the Court of the Judicial Commissioner should be varied in this respect, but otherwise affirmed, and that the decree in the present appellant's appeal to that Court should be affirmed. With regard to the costs of the appeal, their Lordships think that the appellant must bear them.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for respondent: *Watkins & Lempriere.*

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AND
SHADAGOPA MODELAR . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Practice—Application to Stay Execution pending Appeal.

Where on an application for stay of execution the High Court had indicated an opinion that the same ought to be granted, an Order in Council to that effect was made on an undertaking by the petitioners to file their petition and case within a fortnight from the arrival of the record, with leave to the respondent to apply to the High Court for the appointment of a receiver, or for payment into Court, or other relief.

THIS was a petition by the appellants, who were defendants in the action, for an Order in Council staying proceedings in execution of a decree of the High Court dated March 13, 1905, pending

* *Present*: THE EARL OF HALSBURY, LORD MACNAGHTEN, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

the disposal of their appeal, subject to fitting terms and conditions.

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The petition stated that the said decree directed a sale of certain hypothecated properties in default of payment of a sum of money ascertained to be due to the respondent under the hypothecation bond in suit, and that an appeal therefrom had been admitted by the High Court. It then alleged an order on February 23, 1906, made on their application to stay execution pending the appeal, to the effect that execution be stayed for three months, so as to give the petitioners an opportunity to apply to the Privy Council in that behalf.

De Gruyther, for the petitioners.

Kenworthy Brown, for the respondent.

The judgment of their Lordships was delivered by

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LORD MACNAGHTEN. Their Lordships desire to repeat what has been often stated by this Board before, namely, that applications of this sort ought always to be made, in the first instance at any rate, to the Court in India, which has ample power to deal with the matter according to the circumstances of the particular case, and has knowledge of details which this Board cannot possess on an interlocutory application. In the present case their Lordships know no more than what is brought before them by affidavits not altogether satisfactory. There is, however, an indication in the judgment of the High Court shewing that in their opinion an extension of the stay of proceedings ought to be granted. Acting upon that suggestion their Lordships will humbly advise His Majesty to grant a stay of proceedings on the appellants giving an undertaking by their counsel to lodge the petition of appeal and their case within a fortnight from the time the record arrives in England, and also at the same time to give the respondent leave to apply to the High Court at Madras either for the appointment of a receiver, or for payment of a reasonable amount into Court, or any other relief which he may be advised to apply for. The appellants must pay the costs of this application in any event.

Solicitor for petitioners : *Douglas Grant*.

Solicitors for respondent : *Lawford, Waterhouse & Co.*

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MOHUNT GANESH DAS. PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Bengal Act VII. of 1880, ss. 12, 16, 17, 24—Bengal Act IX. of 1880, s. 16—Sale in Execution of a Certificate—Certificate and Sale set aside by the Revenue Authorities—Suit by Purchaser—Jurisdiction—Limitation.

Where a sale was made under Bengal Act VII. of 1880 of the respondent's estate in execution of a certificate granted by a deputy collector in respect of a fine imposed on the respondent for non-compliance with a notice under s. 16 of the Cess Act (Bengal Act IX. of 1880), and the appellant was put in possession as purchaser, it appeared that the Board of Revenue subsequently to the sale decided that the fine was unjust and set aside the certificate, and that thereafter the Commissioner annulled the sale.

In a suit by the respondent against the appellant to set aside the sale and recover possession :—

Held—(1.) the Revenue authorities had jurisdiction to make the orders setting aside the certificate and annulling the sale, their power of supervision in that respect under Act VII. of 1880 (see ss. 17 and 24) being of the widest possible character ;

(2.) The period of limitation prescribed by ss. 12 and 16 is inapplicable to the exercise of revisional jurisdiction ;

(3.) The proper remedy for the purchaser, if aggrieved by the orders of the Revenue authorities having been made in his absence, was to apply for rehearing, and it was too late to apply for a remand on that ground.

APPEAL from a decree of the High Court (March 30, 1898), affirming a decree of the Second Subordinate Judge of Tirhoot (April 5, 1896).

The suit was brought under the circumstances detailed in their Lordships' judgment praying that the sale in question be set aside as "illegal, irregular, fraudulent and ultra vires." The relief sought was recovery of possession with mesne profits. The sale was made under Bengal Act VII. of 1880, which has since been superseded by Act I. of 1895.

The Subordinate Judge was of opinion that both the Commissioner and the Board of Revenue in exercise of their powers

* *Present*: LORD DAVEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

of revision had jurisdiction to cancel the certificate and to set aside the sale ; and if they had rightly exercised the jurisdiction vested in them in passing those orders such orders were binding upon the parties, and he held that by those orders the appellant's right to the property purchased by him was entirely extinguished.

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The High Court, in affirming this decision, said : " The law allows the Civil Court to reverse a sale under certain circumstances ; but there is nothing in the law authorizing a Civil Court to reverse the order of a Revenue Court which sets aside a sale. We cannot question its decision on a question of limitation any more than it would be possible for us in a suit to determine that a decree made in another suit was barred by limitation, and that the decree was therefore without jurisdiction. If authority were required for this last proposition, we would refer to the decision of a division bench of this Court reported in I. L. R. 2 Calc., p. 289. The well-known case of *Mungul Pershad Dichit v. Grija Kant Lahiri Chowdhry* (1) also supports the proposition that an erroneous decision on a question of limitation cannot be treated as invalid unless it be set aside in a way provided by law.

" A similar reasoning would prevent our entertaining any objection to the Commissioner's order on the ground that he had not heard the purchaser. If the purchaser was aggrieved on this account, there is no doubt that he could have found an appropriate remedy in the procedure of the Revenue Courts ; but whether that be so or not, we cannot treat as invalid an order made by the tribunal to which the Legislature has entrusted the power of making such order. We have no power to enquire into the circumstances under which the order was made, or into the propriety of the order."

Cohen, K.C., and *C. W. Arathoon*, for the appellant, contended that the Revenue Court had acted without jurisdiction in annulling the sale. They had moreover acted improperly, for there had been no proper adjudication on the allegation of fraud and collusion, and the matter had been decided after the appeal was barred by limitation and in the appellant's absence and without proper notice to him. The Courts below had based

(1) (1881) L. R. 8 Ind. Ap. 123.

J. C. their decisions entirely on those of the Revenue Courts, and had
 1906 not investigated the questions at issue. Reference was made to
 LALITSWAR ss. 16, 17 and 24 of Act VII. of 1880; *Nilmani Burnick v. Puddo*
 SINGH *Lochan Chuckerbutty* (1); *Sadhusaran Singh v. Panchdeo Lal*. (2)
 v. *De Gruyther* for the respondent, was not heard.
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The judgment of their Lordships was delivered by

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 SIR ANDREW SCOBLE. In this case special leave to appeal was granted on the ground that substantial questions of law arose upon the decisions of the Courts in India, which had given concurrent judgments in favour of the original respondent, the plaintiff in the suit.

The suit was brought by the plaintiff to set aside the sale of a village called Subhankarpore, stated to be worth a lakh of rupees, the property of the plaintiff, which had been put up to auction under the provisions of Bengal Act VII. of 1880—the Public Demands' Recovery Act—and purchased for Rs.1100 by Maharaj Ganeswar Singh, whose estate is represented by the present appellant. The sale was made in execution of a certificate granted by a Deputy Collector in respect of a fine imposed on the plaintiff for failure to comply with a notice issued under s. 16 of Bengal Act IX. of 1880—the Cess Act.

The sale took place on September 19, 1893, and the purchaser was put in possession of the village on December 5 following. On January 2, 1894, the plaintiff presented a petition to the Commissioner of the division, alleging that he had no knowledge of the proceedings which had led to the sale, and that they ought to be set aside and the sale cancelled as irregular, fraudulent, and collusive. The Commissioner, after hearing the vakils for both parties, by his order of December 12, 1894, admitted the appeal, on the ground that the evidence for the petitioner made out "a prima facie case of fraud, or at any rate of irregularities, which prevented the petitioner from obtaining knowledge of the proceedings against him, and caused the sale of his estate at a most inadequate price"; and he referred it to the Collector "to reply specifically to the allegations of the

(1) (1866) Beng. L. R. supp. vol. (2) (1886) I. L. R. 14 Calc. 1, 9.
 F. B. 379.

petition." No report was apparently made by the Collector, probably because the purchaser, in his turn, appealed to the Board of Revenue against the Commissioner's order, with the result that the Board, by an Order of May 9, 1895, decided that the fine was unjust, and had "no hesitation in setting aside the certificate for its recovery." On February 4, 1896, the Commissioner passed a formal order annulling the sale, on the ground that "it was brought about fraudulently and without legal justification."

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Upon these proceedings before the Revenue authorities being put in evidence before the Subordinate Judge of Tirhoot, in whose Court the suit was pending, he passed a decree in favour of the plaintiff on the ground that, the certificate and sale having been set aside by a competent tribunal, the purchaser's claim to the property could not be maintained. This decree was confirmed on appeal by the High Court at Calcutta.

The questions argued before their Lordships were three in number: First, that the Revenue authorities had no jurisdiction to make the orders on which the decree of the Civil Court was based; secondly, that the appeal to the Commissioner was barred by limitation; and thirdly, that the defendant was not allowed to adduce full evidence in support of his case.

Upon the first question their Lordships entertain no doubt. In the case of *Sadhusaran Singh v. Panchdeo Lal* (1) the High Court of Calcutta has held that Bengal Act VII. of 1880 applies to cases of road and other cesses; and, that being so, it is necessary to look to that Act in order to ascertain the extent of the jurisdiction conferred upon the higher Revenue authorities over the proceedings of their subordinate officers. This appears to be of the widest possible character. Sect. 17 provides that "the Commissioner may in any case in which he thinks fit, revise any order passed by a Collector, or Deputy Collector, or Assistant-Commissioner, or Extra Assistant-Commissioner." In the opinion of their Lordships this applies to orders made after as well as before sales in execution of certificates issued under the Act. And s. 24 enacts that "all Collectors, Deputy Collectors, Assistant-Commissioners, and

(1) I. L. R. 14 Calc. 1, 9.

J. C. Extra Assistant-Commissioners shall, in the performance of their
1906 duties under this Act, be subject to the general supervision and
LALITESWAR control of the Commissioners of Divisions and the Board of
SINGH Revenue." These extensive powers were no doubt given to
v. prevent any abuse of authority under the extremely stringent
MOHUNT and summary procedure authorized by the Act, and are, in their
GANESH Lordships' opinion, amply sufficient to justify the orders of
DAS. which complaint is now made.

Upon the second question, it is quite true that under s. 12 of the Act a person who denies his liability to pay the amount for which a certificate has been made and filed against him is allowed thirty days within which he may petition the Collector to set aside the certificate either in whole or in part; that thereupon the Collector must proceed to determine the liability of the petitioner; and that under s. 16 an appeal from the Collector's order may be preferred within thirty days from the making of the order. But this was not the procedure under which the order now complained of was made. The Commissioner acted in the exercise of his revisional jurisdiction under s. 17; and it would defeat the object of the Legislature if the periods of limitation applicable in ordinary cases were held binding upon him when so acting.

The third point was that the defendant was not permitted to bring forward full evidence in support of his case. Their Lordships entirely agree with the learned judges of the High Court that it is "an elementary principle which is binding on all persons who exercise judicial or quasi-judicial powers, that an order should not be made against a man's interest without there being given to him an opportunity of being heard." In his order of February 4, 1896, annulling the sale, the Commissioner says "it is quite unnecessary to hear the purchaser before disposing of this petition," the ground of his decision being that the effect of the order of the Board of Revenue cancelling the certificate was to render the sale null and void; and that, there being "no question as to the illegality of the sale," the formal order which he was asked to make followed as a matter of course. This is not a sufficient reason, though it may be doubted whether the purchaser was prejudiced by the irregularity. But,

however this may be, it seems to their Lordships that the proper remedy of the purchaser, if aggrieved by this order having been made in his absence, was to apply to the Revenue authorities for a rehearing, and that it is now too late to ask for a remand on that ground.

Their Lordships will humbly advise His Majesty that this appeal ought to be dismissed, and the decree of the High Court, dated March 30, 1898, confirmed. The appellant must pay the respondent's costs of the appeal.

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Solicitors for appellant: *Gill, Pugh & Davey.*

Solicitors for respondent: *Watkins & Lempriere.*

RAMANATHAN CHETTI DEFENDANT;

AND

MURUGAPPA CHETTI PLAINTIFF.

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ON APPEAL FROM THE HIGH COURT AT MADRAS.

*Management of Hindu Temple—Turns of Management—Family Arrangement
—Scheme proved by unbroken Usage for Nineteen Years.*

The office of manager of a Hindu temple was vested by inheritance in eight male descendants of the last holder by his two wives, four by each. One member of each branch held office for one year in alternate succession till 1881-2, when the four members of the junior branch, including the appellant, relinquished their claim in favour of the respondent, a member of the senior branch.

In a suit by the respondent against the appellant in effect to assert his term of office under this family arrangement:—

Held, that an unbroken usage for nineteen years was, as against the appellant, conclusive evidence thereof. The parties were competent to make it, for it involved no breach of trust; and it must hold good until altered by the Court or superseded by a new arrangement.

APPEAL from a decree of the High Court (August, 12, 1906), affirming a decree of the Subordinate Judge of Madura (East).

The question decided relates to the management of certain endowed property consisting of a temple and lands assigned for the support of its services. On the death of the last holder the

* *Present*: LORD MACNAGHTEN, SIR ANDREW SCOBLE, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

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management of the temple and the endowed property devolved by inheritance on his male issue, consisting of eight sons, four by each of his two wives. A son of each wife managed in alternate years till 1880, when it was agreed by all the sons that the four by the second wife, including the appellant, should cede their turns to the respondent, a son by the elder wife, who thereupon became entitled to five years of management, and the remaining three members of the senior branch to one year each. At the end of the appellant's year of management disputes and differences arose between him and the respondent; and thereupon the suit was brought to recover possession of the disputed villages with mesne profits, and of certain jewellery and books of account.

The defence did not deny the course of management alleged; it was, however, urged that the agreement by which this course had been adopted was revocable. It was denied that the issue of the second wife had, in fact, transferred or delegated their right to manage to the respondent; and it was pleaded that such transfer or delegation, if proved in fact, was invalid in law. It was also denied that the respondent was entitled for any term to exclusive possession; that the appellant was in possession of all the accounts claimed, and that the mesne profits were as great as alleged in the plaint.

The Subordinate Judge found that the evidence proved a course of management as alleged in the plaint, and that this arrangement was not revocable at will. He found that the appellant had delivered possession to the respondent of the temple, villages, and the temple properties, other than the jewellery, at the end of his term in July, 1899; and that the appellant subsequently unlawfully obtained possession of the villages, and carried off the accounts belonging to the temple. He was of opinion that the scheme had been altered by the delegation in fact to the knowledge of the appellant of their rights to manage by the members of the junior branch in favour of the respondent, and that the altered scheme was binding on the appellant, and had ever since been acquiesced in by the appellant and all parties. He considered that the claims of the junior branch were barred by limitation in consequence of the adverse exercise of the rights to manage as against them for a period exceeding twelve years

prior to suit. In accordance with these findings he made a decree directing the delivery of possession of the villages in dispute, of the movable property, and of the books of account claimed, and also the payment of the mesne profits.

In appeal the High Court affirmed the finding of fact that the scheme of management was settled as stated in the plaint, and also the finding that the said scheme was not revocable. It also held that the claims of the junior branch were barred by limitation. On the question of delegation of their rights, it was found as a fact that such delegation had been made and acted on for a long series of years. There was evidence of a document having been drawn up evidencing the delegation. This document was lost, and was admittedly not stamped at the time of execution. The High Court decided that in the absence of the document no other evidence could be admitted of its contents, but was of opinion that a course of action extending over a long term of years in which the appellant had acquiesced sufficiently proved the alteration alleged by the respondent in the original scheme of management.

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Cohen, K.C., and W. C. Bonnerjee, for the appellant, contended that the High Court was wrong in holding that the members of the junior branch of the family had lost their right to their turns of management by the operation of the law of limitation. On the case set up by the respondent, his exercise of their right was not adverse to them. Reference was made to Act XV. of 1877, s. 28, and Sched. II., art. 124. The Court, moreover, found that the respondent managed during his tenure of office, not for himself alone, but on behalf of all the members of the senior branch with their consent. He did not, therefore, acquire any adverse right against them, and they could withdraw, each for himself, the assent which he had given. There had been no completed transfer of rights, and the arrangement come to amongst themselves was revocable. A trustee cannot substitute another person for himself as trustee, and if he purports to do so the arrangement between them is not binding, and the appellant was at any time entitled to object to it. Rights to management did not, either by operation of the law of limitation or by actual transfer, vest in

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the respondent alone to the exclusion of the other members of the family or any of them. The turns by which the trustees held the management were liable to alteration at the will of any one of their number, and were not absolutely and permanently binding on them. There was no emolument attached to the trust, and therefore a Civil Court was not competent to declare that the trustees should in rotation enjoy rights of management for a definite period: see *Sri Raman Lalji Maharaj v. Sri Gopal Lalji Maharaj*. (1)

Sir R. Finlay, K.C., and *De Gruyther*, for the respondent, contended that the respondent had validly acquired the right to manage as vested in the junior branch. Although Hindu text writers treat offices of the kind in question in this suit as indivisible, yet modern custom and decided cases sanction their partition by means of the coparceners enjoying their office separately in rotation. The two branches of the family had assented, as they were entitled under the Hindu law to do, to a scheme of management as detailed in the plaint and concurrently found by the Courts. That arrangement was validly made, and the scheme so assented to was not revocable at the will of the appellant, and could only be altered as the original scheme of management was altered, by the will of all the members agreeing thereto, or by the Court in a suit or other proceeding properly framed for that purpose. A long-established practice under that agreement fully proves it and entitles the respondent to act as the delegate of the junior members. Reference was made to *Mancharam v. Pranshankar* (2); *Mayne's H. L. ss. 499, 468* (6th ed. pp. 568 and 612); *Gossamee Sree Greedharreejee v. Rumanlolljee Gossamee* (3); *Maharaja Jagadindra Nath Roy v. Hemanta Kumari Debi*. (4)

Cohen, K.C., replied, citing *Trimbak v. Lakshman*. (5)

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The judgment of their Lordships was delivered by
LORD MACNAGHTEN. In the village of Kottoor, in the Zemin-dari of Sivagunga, there is a Hindu temple dedicated to the

- (1) (1897) I. L. R. 19 Allah. 428. (3) (1889) L. R. 16 Ind. Ap. 137.
(2) (1882) I. L. R. 6 Bomb. 298. (4) (1904) L. R. 31 Ind. Ap. 203, 208.
(5) (1895) I. L. R. 20 Bomb. 495, 501.

public worship of the deity in whose honour it was founded, and endowed with the revenue of three villages. The office of manager of this temple is hereditary in a family of which the appellant and respondent are both members, but the family has no beneficial interest in the property or in the income of the temple.

The office of manager was formerly vested in one Mayandi Chetti, who was grandfather of the respondent and great-grandfather of the appellant. On Mayandi's death the office devolved by inheritance on his male descendants by his two wives. There were four by each wife, or eight in all. One member of each branch took the management for one year in alternate succession until the year 1881-1882. About that time the members of the junior branch renounced or relinquished their claim to the office in favour of the respondent, who is a member of the senior branch. During the nineteen years immediately preceding the institution of this suit, in each cycle of eight years, there has been a settled order of succession among the members of the senior branch. The respondent has had five turns, and the appellant and the other two representatives of the senior branch one turn each.

In accordance with this arrangement the appellant held the office of manager of the temple, and the property belonging to it, from 1st Adi of the year Vilambi (July 15, 1898) to 30th Ani of the year Vikari (July 18, 1899). On the expiration of that year it was the respondent's turn to hold office for the next three years—one year in his original right and two years in right of the junior branch. The appellant handed over the temple to the respondent, but he kept back the jewels and retained or retook possession of the three villages with which the temple is endowed.

The respondent then brought this suit to recover the jewels and the villages, with mesne profits. The appellant did not dispute the facts alleged by the respondent, but he set up various defences on points of law. Both the Subordinate Judge and the High Court decided against him.

In their Lordships' opinion the case is a very simple one. They think the unbroken usage for a period of nineteen years is as against the appellant conclusive evidence of a family arrangement to which the Court is bound to give effect. Twice during

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the period of nineteen years the appellant has, in his proper turn, enjoyed the position of manager for a year. The arrangement seems to have been a perfectly proper arrangement conducing to the due and orderly execution of the office. It was one which the Court would no doubt have sanctioned if its authority had been invoked. It was one which, in their Lordships' opinion, the parties interested were competent to make without applying to the Court. If the appellant wishes to set it aside and to have a new scheme settled, he must take proper proceedings. If he has any ground for attacking the management of the temple or the administration of the property attached to it, the Courts are open. But it is not for him, at his will and pleasure, to disturb an arrangement of which he has on more than one occasion taken the benefit. It is plain that the arrangement was not intended to be merely temporary, nor can it be regarded as precarious. It must hold good until altered by the Court or superseded by a new scheme effected with the concurrence of all parties interested.

The argument on behalf of the appellant seems to have been founded on a mistaken analogy. The manager of the temple is by virtue of his office the administrator of the property attached to it. As regards the property, the manager is in the position of a trustee. But as regards the service of the temple and the duties that appertain to it, he is rather in the position of the holder of an office or dignity which may have been originally conferred on a single individual, but which, in course of time, has become vested by descent in more than one person. In such a case, in order to avoid confusion or an unseemly scramble, it is not unusual, and it is certainly not improper, for the parties interested to arrange among themselves for the due execution of the functions belonging to the office in turn or in some settled order and sequence. There is no breach of trust in such an arrangement, nor any improper delegation of the duties of a trustee.

The members of the junior branch are not before the Court. Their rights, if they have any, are not affected by this suit. The appellant cannot be allowed to put himself forward as their champion to disturb an arrangement with which they seem to be quite content.

Their Lordships will humbly advise His Majesty that the appeal must be dismissed. The appellant will pay the costs of the appeal.

Solicitors for appellant: *Sanderson, Adkin, Lee & Eddis.*

Solicitor for respondent: *Douglas Grant.*

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PUCHA VENKATA RAMANA AND OTHERS. DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Hindu Law—Power to adopt—Construction—Power to adopt Successive Sons.

Where a Hindu has granted to his widow a power to adopt and has placed no specific limitation thereto, and it is clear that he desired to be represented by a son after death in order to secure spiritual benefit to himself and to continue his line:—

Held, that the widow's authority to adopt is not exhausted by a first adoption, but that, on the death of the first adopted son, the adoption of a second is a valid exercise of the power.

APPEAL from a decree of the High Court at Madras (March 18, 1903), affirming a decree of the District Court of Ganjam (September 22, 1900).

The question decided in the appeal is whether the adoption of the first respondent by the second respondent as a son to her husband Kannepalli Venkata Narasu, deceased, was a lawful and valid adoption.

The adoption in suit was made on June 10, 1898, by Venkata Ratnamma of Pucha Venkata Ramana. On that date Venkata Ratnamma executed a deed of adoption, and also a deed by which she transferred the major portion of her husband's estate to the adopted son, retaining the remainder in her own possession for

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life. The suit was instituted on October 7, 1899, under the circumstances stated in the judgment of their Lordships, by members of the family interested to obtain a declaration as to its invalidity. The defendants were Venkata Ratnamma and the adopted son. The validity of the adoption was challenged on the grounds (*inter alia*) that it was made without the authority of Venkata Narasu, the husband of the second respondent, and that the assent of two remote collaterals did not avail to supply that omission.

The respondents contended that the second respondent had full power and authority from her husband to adopt the first respondent, and relied thereon, and also on the said assent.

The High Court had "no hesitation in agreeing with the District Judge in finding that the second defendant's husband did authorize his wife to adopt to him." They continued: "The authority, as proved by the witnesses, was in general terms requiring her to adopt so as to continue his line and to provide for his spiritual benefit. He did not indicate any particular person for adoption either by name or otherwise, and placed no restrictions whatever on his wife's discretion.

"Such being the case, the question is whether the authority so given was exhausted by the first adoption, or whether, on the death of the son then adopted, the authority of the husband survived so as to enable the widow to make the present—that is, a second adoption. We are not aware of any judicial decision which would bind us to hold that the husband's authority, in circumstances like the present, is so completely worked out by the first adoption as to prevent the widow from acting upon it when necessity arises for a fresh adoption, the estate being still vested in her, and being liable to be divested by such adoption. We are of opinion that the husband's authority held good for the second adoption also. The object and purpose of the authority given by the husband was to perpetuate his family as well as to secure his spiritual benefit, and it would be unreasonable to hold that an accident such as the early death of the boy first adopted should be allowed to frustrate the fulfilment of his object and to preclude the widow from making another adoption in the absence of any legal impediment to her doing so. When the

general intention of a Hindu to be represented by an adopted son is clear, as in this case, there seems no reason why effect should not be given to such intention, if it is possible to do so without contravening the law. Each case must be decided on its own merits, without applying too strict a rule of construction in regard to powers of this description.

"We are supported in our view by the decision of Sir Thomas Strange in *Veerapermall Pillai v. Narrain Pillai* (1), where a widow was held entitled to adopt a boy in furtherance of her husband's general intention in lieu of another indicated by him, but who was not available: the same principle has been adopted by the Bombay High Court in *Lakshmi Bai v. Rajaji* (2), where the boy who was indicated for adoption not being available, the adoption of another was upheld.

"It would appear from the note 8 at p. 14 of Morley's Digest that 'instances have occurred in which a widow has made a second adoption on the failure of the first by death in fulfilment of a single injunction or authority from her husband, the object of such injunction being unattained unless the child live.' Another instance of the husband's general intention being acted on by the widow without disapproval, even where the husband did not directly give authority for the adoption, is to be found in *Ramasawmi Aiyar v. Vencataramaiyan* from this Presidency reported in L. R. 6 Ind. Ap., p. 196. So that the practice of the community has been in accordance with our view of the law." In this view of the case it became unnecessary for the learned judges to decide whether the assent of the sapindas validated the adoption or not. They nevertheless thought that the assent was given in terms too general and at a time too remote to be of any use.

De Gruyther, for the appellants, contended that on the evidence there was no sufficient proof of Venkata Narasu ever having given to his wife any authority to adopt. Assuming that an authority to adopt was given in the terms deposed to by the witnesses, it was not sufficient to authorize the adoption in suit. It was general in terms to adopt a son. That power

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(1) (1891) 1.Str. 91.

(2) (1897) I. L. R. 22 Bomb. 996.

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was exhausted as soon as an adoption had been made under it. It did not extend to authorize a second adoption after the death of the adopted son. That was a contingency not contemplated by the grantor, and the power to make a second adoption could not arise by implication. A power to adopt must be strictly followed. A second adoption had no religious motive, for the salvation of the ancestor, which was the religious motive for adoption, was secured by the adoption of the first son, even if his death followed very soon afterwards, as in this case. Reference was made to *Collector of Madura v. Moottoo Ramalinga Sethupathy* (1); *Mutsaddi Lal v. Kundan Lal* (2); *Amrito Lal Dutt v. Surnomoye Dasi* (8); *Surendra Keshav Roy v. Doorgasundari Dassee* (4); *Chowdhry Pudum Singh v. Koer Oodey Singh* (5); *Teeloke Chundur Raee v. Gyanchunder Raee* (6); *Gournath Chowdhree v. Arnopoorna Chowdhraim* (7); *Mohendrolall Mookerjee v. Rookiney Dabee* (8); *Purmanund Bhattacharuj v. Oomakant Lahoree* (9); *Amirthayyan v. Ketharamayyan* (10); *Sri Balusu Gurulingaswami v. Ramalakshamma* (11); 1 *Strange's Hindu Law*, 78, 79; *Mayne's Hindu Law*, 6th ed. par. 114, p. 148; *Lakshmi Bai v. Rajaji* (12); *Shamchunder v. Narayni Dibeh* (13); 1 *Morley's Digest*, p. 14, note 3; *Narayanasami v. Kuppusami* (14); *Ramasawmi v. Venkataramaiyan* (15); *Sreemutty Dossee v. Tarrachurn Koondoo* (16); *Parasara Bhattar v. Rangaraja Bhattar*. (17)

It was next contended that the assent to the second adoption given by the two sapindas, who were remote collateral relations of the husband, did not validate the adoption in suit. It was not shewn that any discretion had been exercised in giving permission to adopt. The terms of the assent were very general, and it

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| (1) (1868) 12 Moo. Ind. Ap. 397, | (10) (1890) I. L. R. 14 Madr. 65. |
| 433. | (11) (1899) L. R. 26 Ind. Ap. 113, |
| (2) (1906) L. R. 33 Ind. Ap. 55. | 142. |
| (3) (1900) L. R. 27 Ind. Ap. 128. | (12) I. L. R. 22 Bomb. 996. |
| (4) (1892) L. R. 19 Ind. Ap. 108. | (13) (1807) 1 S. D. A. Beng. 209. |
| (5) (1869) 12 Moo. Ind. Ap. 350. | (14) (1887) I. L. R. 11 Madr. 43. |
| (6) (1847) S. D. A. Beng. 554. | (15) (1879) L. R. 6 Ind. Ap. 196, |
| (7) (1852) S. D. A. Beng. 332. | 202. |
| (8) (1864) Coryton's Rep. 42. | (16) (1865) Bourke's Rep. A. O. C. |
| (9) (1828) 4 Sel. Rep. 318. | 48, 55. |
| (17) 1880) I. L. R. 2 Madr. 202. | |

was not shewn to have been acted on within a reasonable time after it had been given: see West and Buhler, H.L. p. 967; *Collector of Madura v. Mootoo Ramalinga Sethupathy* (1); *Sri Raghunada v. Sri Brozo Kishoro* (2); *Rajah Vellanki Venkata Krishna Row v. Venkata Ramalakshmi Narsayya* (3); *Karunabdhi Ganesa Ratnamaiyar v. Gopala Ratnamaiyar*. (4)

W. C. Bonnerjee, for the respondents, contended that the power of adoption given in this case was effectual to validate the adoption in suit. It was a question of the nature and extent of the power given in this particular case. There was no necessity to refer to other cases. Each case must be decided on its own circumstances. There was nothing in the authority given by Venkata Narasu to confine the power of adoption within the limits of a single exercise, or to necessitate the construction that by one adoption the power was exhausted. As long as a previously adopted son was dead, the power existed to make a fresh adoption. In the case cited on the other side from (1852) S. D. A. the direction was confined to adopting one son, and the power so given must be restricted according to its terms. Here the terms were general, and there was no authority or reason for restricting them. Reference was made to the synopsis in Stokes' Hindu Law Books; Golapchandra Sarkar's Tagore Lectures, 234; *Surendra Nandan v. Sailaja Kant Das Mahapatra* (5); *Lakshmibai v. Rajaji* (6), which was a case governed by the Mitakshara, and not the Mayukha. The District Judge was right in deciding that the assent of the three sapindas was sufficient to validate the adoption, even if it were not strictly or at all within the power given by the husband. There was no law that only the immediate reversioners could give the required assent of the sapindas. It was contended that the adoption in suit was in all respects legal, valid, and effectual.

De Gruyther replied.

- (1) 12 Moo. Ind. Ap. 397, 441. (4) (1880) L. R. 7 Ind. Ap. 173,
 (2) (1876) L. R. 3 Ind. Ap. 154, 177.
 188, 193. (5) (1891) I. L. R. 18 Calc. 385,
 (3) (1876) L. R. 4 Ind. Ap. 1. 392.
 (6) I. L. R. 22 Bomb. 996.

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The judgment of their Lordships was delivered by

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SIR ANDREW SCOBLE. In this case there is no dispute about the facts, but two questions of law arise, both of which are of considerable importance.

Venkata Narasu, a Brahmin landowner in the district of Ganjam, in the Madras Presidency, died intestate and without issue on February 6, 1861, leaving the second respondent, Venkata Ratnamma, his widow and sole heiress, him surviving. Before his death he verbally authorized his wife to adopt to him, and it is found by the learned judges of the High Court that the authority was "in general terms, requiring her to adopt so as to continue his line, and to provide for his spiritual benefit. He did not indicate any particular person for adoption, either by name or otherwise, and placed no restrictions whatever on his wife's discretion."

Twenty-four years after her husband's death, on May 1, 1885, the widow adopted a son of one of her sisters, but this child died in February, 1886, and twelve years later, on June 10, 1898, she adopted the first respondent. Prior to making this second adoption she obtained the consent of the elder representatives of two branches of her husband's family. The representatives of two other branches refused their consent, and on October 7, 1899, brought the present suit to set aside the second adoption, as having been neither authorized by her husband nor made with the consent of his sapindas.

Upon these facts the first question which their Lordships have to determine is whether the authority to adopt given by the husband was exhausted by the first adoption; or whether, on the death of the son first adopted, the authority of the husband survived so as to empower the widow to make a second adoption.

So far as their Lordships have been informed, there is no decisive text of the ancient Hindu lawgivers upon this point. The earlier English authorities express conflicting views. Sir F. Macnaghten, writing in 1824, at p. 175 of his *Considerations on the Hindu Law*, says:—

"If a woman be empowered by her husband to adopt a son, and if she does adopt one accordingly, it has never, I believe, been declared by any writer that this power can go beyond the

adoption of one, or, without special authority from the husband, be extended to the adoption of another if the first adopted should die."

Sir William Macnaghten, writing in 1829, is less positive:—

"It is a disputed point," he says, "whether a widow having, with the sanction of her husband, adopted one son, and such son dying, she is at liberty to adopt another without having received conditional permission to that effect from her husband. According to the doctrine of the Dattaka Mimansa, the act would clearly be illegal; but Jagannatha holds that the second adoption in such case would be valid, the object of the first having been defeated": Hindu Law, i. 86.

Sir Thomas Strange, writing in 1830 as to the law prevalent in Madras, says:—

"There exists nothing to prevent two successive adoptions, the first having failed, whether effected by a man himself, or by his widow or widows after his death, duly authorized": Hindu Law, i. 78.

There are not many reported cases on the point. In Morley's Digest (i. 14), published in 1850, there is a note to the effect that "instances have occurred in which a widow has made a second adoption on the failure of the first by death, in fulfilment of a single injunction or authority from her husband, the object of such injunction being unattained unless the child live."

The case of *Gournath Chowdhree v. Arnopoorna Chowdrain* (1) is a distinct authority that where a widow is directed to adopt a son, she cannot adopt a second if the first adopted son dies. This case was decided by the Bengal Sudder Court in 1852, and is cited in modern text-books as establishing the proposition. The issue to be determined in the case is thus stated in the report:—

"There being no permission in the unoomuttee puttur" (or deed of adoption) "to adopt (children) one after another, is it proper, according to the shaster, to adopt one (child) after the death of another?"

The bywusta of the pundit to whom this question was submitted by the Court was:—

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"The deed put in does not restrict the adoption to one son only, and therefore, on the death of the previous adopted son, another may be adopted."

In their judgment the learned judges first cite the passage from Sir William Macnaghten quoted above, omitting the last sentence relating to Jagannatha's opinion, and go on to say:—

"As it is a principle of Hindoo law that, without permission, no son can be adopted, it is a fair legal inference that a second adoption on the death of the first child, when the husband is no longer alive to grant permission to adopt, cannot be valid."

Their Lordships are unable to attach much weight to this decision. It discards the opinion of the pundit, refers to no previous decisions, does not attempt to discuss the conflicting views of the vernacular authorities cited by Macnaghten, and rests upon an inference which begs the whole question. Whether, and how far, this case is still followed in Bengal, it is not necessary now to inquire. For the purposes of this appeal it is enough to say that it is not a binding authority in Madras.

The learned judges of the High Court, one of whom is a Hindu lawyer of great distinction, in their judgment say:—

"The cases in Calcutta to which our attention has been drawn adopt what appears to us to be too artificial a rule of construction in that they practically disregard the question of intention;" and they hold that "when the general intention of a Hindu to be represented by an adopted son is clear, as in this case, there seems no reason why effect should not be given to such intention, if it is possible to do so without contravening the law."

The practice of the community, they add, has been in accordance with this view. As regards this particular case, they say:—

"The object and purpose of the authority given by the husband was to perpetuate his family as well as to secure his spiritual benefit, and it would be unreasonable to hold that an accident such as the early death of the boy first adopted should be allowed to frustrate the fulfilment of his object, and to preclude the widow from making another adoption in the absence of any legal impediment to her doing so."

Their Lordships agree with the learned judges of the High

Court in the opinion that the main factor for consideration in these cases is the intention of the husband. Any special instructions which he may give for the guidance of his widow must be strictly followed; where no such instructions have been given, but a general intention has been expressed to be represented by a son, their Lordships are of opinion that effect should, if possible, be given to that intention. This more liberal rule has been followed by the High Court of Bombay, as well as in Madras, and is not without support in Bengal. In a comparatively recent case reported, *Surendra Nandan v. Sailaja Kant Das Mahapatra* (1) the learned judges of the High Court at Calcutta say, at p. 392:—

“Looking at the religious efficacy that ensues from the adoption of a son by a widow to her deceased husband, we think the Court should not be too astute to defeat an adoption, but should rather do its utmost to support it unless such adoption is clearly in excess or in breach of the power to make it.”

The limitations to the application of the rule are indicated in the judgment of this Committee in the *Ramnad Case* (2), in which their Lordships say:—

“Inasmuch as the authorities in favour of the widow’s power to adopt with the assent of her husband’s kinsmen proceed in a great measure upon the assumption that his assent to this meritorious act is to be implied wherever he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family which afford no plea for a supersession of heirs on the ground of religious obligation to adopt a son in order to complete or fulfil defective religious rites.”

In the present case it is abundantly clear that the husband desired to be represented by a son after his death, and that he placed no specific limitation on the power to adopt, which he entrusted to his widow. His object was twofold—to secure spiritual benefit to himself, and to continue his line. Both

(1) I. L. R. 18 Calc. 385.

(2) 12 Moo. Ind. Ap. 397, at p. 443.

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these objects are meritorious in the view of the Hindu law, and both are in consonance with the feelings known to prevail throughout the Hindu community. In the absence of a natural son, both can be obtained only by adoption. Funeral rites may be performed, and certain spiritual advantages secured, to the deceased by a near male relative; but it is stated in the *Dattaka Chandrika*, a work of some authority in Southern India (s. 1, pl. 22), that—

“Although by reason of the nephew’s possessing the representation of the filial relation, he may be the means of procuring exemption from exclusion from heaven, and so forth; still, as the celebration of name and the due perpetuation of lineage would not be attained, for the sake of the same, the constituting him (an adopted son) is indispensable.”

In his able argument on behalf of the appellants, Mr. De Gruyther contended that, by the adoption of the first adopted son, all the spiritual benefit to be derived from the Act was secured to the deceased, and that the adoption of a second boy was, therefore, supererogatory and could not be held to be justified by the husband’s sanction. This contention is disposed of by the judgment of Romesh Chunder Mitter J. in the case of *Ram Soondur Singh v. Surbanee Dossee* (1), in which a similar argument was put forward:—

“Is there anything,” says that learned judge, “in the general Hindu law in support of the contention . . . ? No passage from any of the treatises on the Hindu law, and no texts of the Hindu shaster have been cited. As far as I am aware there is none in its support. On the other hand, the broad proposition for which the learned counsel contends will in a great many cases defeat the essential object for which every Hindu desires to adopt, viz., the continuance of the spiritual benefit to be conferred upon him after his death. An adopted son attaining an age of sufficient maturity and by performing the religious services enjoined by the shasters, cannot exhaust the whole of the spiritual benefit which a son is capable of conferring upon the soul of his deceased father; because these services are enjoined to be repeated at certain stated intervals, and the performance of them on each

successive occasion secures fresh spiritual benefit to the soul of the deceased father. . . . I am, therefore, of opinion that the contention . . . is opposed to the general principles of the Hindu law."

These observations apply with the greater force to the present case, as the boy first adopted died when little more than two years of age.

For the reasons stated, their Lordships agree with the High Court that the adoption of a second boy in this case was valid, and that the widow's authority to adopt was not exhausted by the first adoption. In the view which they take of the case it is not necessary for their Lordships to consider the second question raised upon this appeal, viz., whether, if the widow's authority had been held to have been exhausted, there was sufficient consent on the part of the husband's sapindas to validate the second adoption.

Their Lordships will humbly advise His Majesty that the decree of the High Court of Madras ought to be confirmed and the appeal dismissed. The appellants must pay the respondent's costs of the appeal.

Solicitors for appellants: *Sanderson, Adkin, Lee & Eddis.*

Solicitor for respondents: *Douglas Grant*

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AND

May 9, 10; July 27. RAJA RAMESHAR BAKHSH SINGH . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF THE JUDICIAL
COMMISSIONER OF OUDH.

*Law of Limitation—Suit for Possession—Defendant's apparent Adoption—
Act XV. of 1877, s. 2, Sch. II., Art. 144.*

Where the respondent, who attained majority in June, 1896, sued in May, 1899, to recover the taluqa in suit as next heir under Act I. of 1869, s. 22, clause 6, and the defendant defended his possession after the lapse of twelve years under an apparent adoption, which both Courts had held to be invalid :—

Held, that there was no acquisition of title by the defendant within the meaning of s. 2 of Act XV. of 1877; that the Limitation Act of 1871 did not apply; and that the suit was barred by art. 144 of the second schedule to the Act of 1877.

Jagadamba Chowdhrahi v. Dakhina Mohun, (1886) L. R. 13 Ind. Ap. 84, distinguished.

APPEAL from a decree of the above Courts (April 11, 1902), affirming a decree of the Subordinate Judge of Lucknow (October 12, 1900) of ejectment against the appellant.

The title to the Taluqa of Samarpaha in the district of Rae Bareli, in Oudh, was in dispute in this appeal. The rival claimants were the appellant, who based his title on an alleged adoption of his father, Thakur Sher Bahadur Singh, and the respondent, who claimed to succeed as next heir under Act I. of 1869, s. 22, clause 6.

The last male owner was Thakur Basant Singh, who died in 1857, and was succeeded by Thakurain Daryao Kunwar, his widow, not in right of her husband, but in her own right, at whose death on November 13, 1893, the disputed succession opened.

To a suit by the respondent claiming as statutory heir as above stated, and alleging that the defendant Sher Bahadur Singh had been illegally placed in possession of the taluqa by the

* *Present*: LORD MACNAGHTEN, SIR ANDREW SCOBLE, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

Revenue authorities, the defendant pleaded in effect that the provisions of s. 22 of the Oudh Estates Act, 1869, did not apply to the succession to taluqdars who were women, but if they did he, as the adopted son, and not the respondent, was the Thakurain's heir, and that at all events the respondent was not entitled to oust him from possession of the estate without having in the first instance obtained a declaration that his, the defendant's, adoption was invalid, and that the right to obtain such declaration had long since been barred by limitation. He further averred that his adoption was valid under the Hindu law and the customs of the thakurs of the Bais clan.

The respondent replied denying the adoption, and alleging that there was no necessity to sue to set it aside. The Subordinate Judge decided, amongst other things—(1.) that Sher Bahadur had been formally adopted as the son of Basant Singh on April 25, 1858, but that the said adoption was invalid in law without the consent of the husband; he found that the special custom set up was not proved, and that no permission to adopt had, in fact, been given by Basant Singh to his wife: (2.) that the suit was not barred by limitation: and (3.) that the succession was governed by Act I. of 1869, s. 22, under clause 6 of which the respondent was the next heir to the Thakurain. He accordingly decreed ejectment with mesne profits.

Upon the question of limitation the ground of the decision was that as the plaintiff was suing for possession of the estate, and not for a declaration that the defendant's adoption was invalid, his right to sue was not barred, as his cause of action accrued on November 13, 1893, when the Thakurain died.

The material passage of the judgment bearing on this point is as follows:—

“It has been urged on behalf of the defendant that the present suit is barred by article 118, Schedule II., Act XV. of 1877 as the adoption of the defendant became known to the plaintiff and his ancestors more than six years before the institution of this suit. Article 129 of Act IX. of 1871 provided a period of twelve years for suits ‘to establish or set aside an adoption from the date of the adoption (or at the option of the plaintiff) from the date of the death of the adoptive father.’

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That article has been broken up into two articles 118 and 119 under the present Act XV. of 1877. Article 118 provides a period of six years for suits to obtain a declaration that an alleged adoption is invalid or never in fact took place from the time when the alleged adoption becomes known to the plaintiff and article 119 provides the same period for 'suit to obtain a declaration that an adoption is valid,' from the time when the rights of the adopted son as such are interfered with. In interpreting article 129 of Act IX. of 1871 their Lordships of the Privy Council held in *Jagadamba v. Dakhina* (1) that the words 'to set aside adoption' meant suits in which the validity or invalidity of an adoption was brought into question and applied to all suits in which the suitor could not succeed without displacing an apparent adoption in virtue of which the opposite party was in possession. The principle enunciated in the above case was re-affirmed by their Lordships in *Mohesh Narain v. Taruck Nath*. (2) The above decisions were given with reference to article 129 of the old Act of 1871. I have not been referred to any authoritative decision of their Lordships on the scope of article 118 of the present Act (XV. of 1877). It is contended on behalf of the defendant that the principle enunciated in the above rulings is applicable to cases governed by the existing law. On the other hand it is argued on behalf of the plaintiff that the words in article 118 denote exclusively a suit confined to a declaration, and exclude a suit for possession or other relief. In *Parvathi Ammal v. Saminatha Gurukul* (3) and in *Shrivanas v. Hanmant* (4) it was held that the principle laid down by their Lordships of the Judicial Committee in *Jagadamba's* case (1) was applicable to article 118 of the present Act and that a plaintiff could only succeed in his suit for possession if he could prove that his suit was not barred under article 118. As against the above cases there has been a strong current of decisions the other way. It was held in the following cases that article 118 of the present Act did not apply to a suit for possession of immovable property though it might be necessary for the plaintiff to prove the invalidity of an adoption:

(1) L. R. 13 Ind. Ap. 84.

(3) (1896) I. L. R. 20 Madr. 40.

(2) (1892) L. R. 20 Ind. Ap. 30.

(4) (1899) I. L. R. 24 Bomb. 260.

Basdeo v. Gopal (1); *Lala Parbhulal v. Mylne* (2); *Ghandarap v. Lachman Singh* (8); *Padajirav v. Ramrav* (4); *Natthu Singh v. Gulab Singh* (5); *Fanyamma v. Manjaya* (6); *Hari Lal v. Bai Rewa* (7); *Jagannath v. Runjit Singh* (8); *Ram Chandra Mukerjee v. Ranjit Singh* (9); *Mussamat Bhagana v. Barjore Singh*. (10)

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" There seems to be a consensus of opinion in most of the High Courts that article 118 of the present Act does not apply to suits for possession and I do not think we are justified in departing from it without the distinct authority of the Privy Council."

The Court of the Judicial Commissioner concurred in holding that the suit was not barred by limitation, and that the succession to the estate in litigation was governed by Act I. of 1869, s. 22. In regard to the adoption, the Court agreed that a Hindu widow could not validly adopt without the authority of her husband; and also affirmed the findings of fact that no authority had been given by Basant Singh, and that no custom had been proved altering the general law so as to dispense with such authority. On the other question of fact as to whether Thakurain Daryao Kunwar had formally adopted Sher Bahadur on April 25, 1858, the said Court reversed the finding of the Subordinate Judge, and found that there was no formal adoption, but only a revocable nomination of a successor to the estate on the death of Thakurain Daryao Kunwar.

Cohen, K.C., and *W. C. Bonnerjee*, for the appellant, contended that the provisions of s. 22 of Act I. of 1869 do not apply to the succession of taluqdari estates granted to women, but only to male taluqdars. The respondent was not heir to the deceased Thakurain under the Hindu law, and could only come in, if at all, as statutory heir under clause 6 of that section. The Courts below relied on *Brij Indra Bahadur Singh v. Janki Kunwar* (11).

(1) (1886) I. L. R. 8 Allah. 644.

(7) (1895) I. L. R. 21 Bomb. 376.

(2) (1887) I. L. R. 14 Calc. 401.

(8) (1897) I. L. R. 25 Calc. 354.

(3) (1888) I. L. R. 10 Allah. 485.

(9) (1899) I. L. R. 27 Calc. 242.

(4) (1888) I. L. R. 13 Bomb. 160.

(10) (1898) Oudh Cases, vol. i. p.

(5) (1895) I. L. R. 17 Allah. 167.

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(6) (1895) I. L. R. 21 Bomb. 159.

(11) (1877) I. L. R. 5 Ind. Ap. 1, 13.

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as an authority the other way. But in that case the question was neither raised nor discussed, and it was assumed on all sides that s. 22 applied. Sect. 22 was not in terms made applicable to female taluqdars, whose case falls naturally under s. 23: see also s. 22, clauses 7 and 11. The defendant, as adopted son, was entitled under s. 22, clause 1, if that section applied, to succeed in preference to the respondent, who only claimed under clause 6. The main ground of appeal was that of limitation. The defendant had been de facto adopted, and the suit was barred by limitation because it necessarily raised the question of the invalidity of that adoption, in reference to which a suit to declare it was barred before the present suit was filed. Act IX. of 1871 applied, and as no suit had been brought within the time fixed by that Act—see art. 129 of its schedule—the validity of the adoption could not be questioned in this suit. The adoption was made in 1858, and the right to dispute its validity was barred and extinguished before the death of the Thakurain in 1898; and accordingly the title which accrued under it became complete under s. 2 of Act XV. of 1877. The principle laid down in Jagadamba's case (1), that where a suit to set aside an adoption was barred so also was any suit which in order to succeed must first get rid of the adoption, applies equally to Act XV. of 1877, Sched. II., art. 118: see *Jagadamba Chowdhurani v. Dakhina Mohun Roy Chowdhury* (1); *Moresh Narain Munshi v. Taruck Nath Moitra* (2); *Parvathi Ammal v. Saminatha Guruka* (3); *Shrinivas v. Hanmant* (4); *Barot Naran v. Barot Jesang* (5); *Ramchandra Mukerjee v. Ranjit Singh* (6); *Bijoy Gopal Mukerji v. Nilratan Mukerji*. (7)

De Gruyther, for the respondent, contended that he was entitled under s. 22, clause 6, of the Act, which section applied. The case in 5 Ind. Ap. 1 was exactly in point. A woman there was taluqdar in her own right, and her name was entered in lists 1 and 2 under the Act. It was held that succession to her estate

(1) L. R. 13 Ind. Ap. 110.

(2) L. R. 20 Ind. Ap. 30, 35.

(3) (1896) I. L. R. 20 Madr. 40.

(4) (1899) I. L. R. 24 Bomb. 260,
270.

(5) (1900) I. L. R. 25 Bomb. 26.

(6) (1899) I. L. R. 27 Calc. 242,

253.

(7) (1903) I. L. R. 30 Calc. 990,

996.

was governed by s. 22. The case of female taluqdars is not excepted from that section in express terms, and there was no reason or authority for excluding them by implication. Sect. 23 only applied to taluqdars whose names are entered in list 4. He referred to *Haidar Ali v. Tassaduk Rasul Khan* (1); *Maharajah Pertab Narain Singh v. Subhao Koer*. (2)

As to the validity of the adoption, which was made without the husband's assent, the cases since 1816 were uniform to the effect that it was invalid, and are to be found collated in *Tulshi Ram v. Behari Lal*. (3)

The real question in reference to the adoption was the question of limitation. The suit was in 1899. The respondent was born in 1875, attained majority in 1896, and sued within three years of attaining it. There was no cause of action until the death of the Thakurain in 1893, for she was fully entitled in her own right, and the respondent had no title until her death. If, on the other hand, time ran from the date of the adoption, there was still no right to sue to set it aside until the respondent had some vested interest opposed to it: see *Kathama Natchiar v. Dorasinga Tevar* (4); *Rani Anund Koer v. Court of Wards*. (5) It was contended that Act XV. of 1877, and not Act IX. of 1871, was the applicable law of limitation. The case was governed by art. 144 of Sched. II. of the later Act. Article 118 differed in its terms from art. 129 of the earlier Act, and did not apply to a suit for possession. It only applied to declaratory suits under the Specific Relief Act (I. of 1877), s. 42: see illustration (f). There had been no acquisition of title by the appellant in virtue of an apparent adoption within the meaning of s. 2 of Act XV. of 1877. Nor could it be laid down under Act XV. of 1877 that a plaintiff must sue for a declaratory decree before suing for possession, and that his suit for possession is barred if a declaratory action is barred: see *Lali v. Murlidhar* (6); *Luchmun Lal Chowdhry v. Kanhya Lal Mowar* (7); *Ram Chandra Mukerjee v. Ranjit*

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(1) (1890) L. R. 17 Ind. Ap. 82.

(4) (1875) L. R. 2 Ind. Ap. 169.

(2) (1877) L. R. 4 Ind. Ap. 228, 233.

(5) (1880) L. R. 8 Ind. Ap. 14, 21.

(6) (1901) I. L. R. 24 Allah. 195,

(3) (1889) I. L. R. 12 Allah. 328, 197.

370, 381, 386.

(7) (1894) L. R. 22 Ind. Ap. 51.

J. C. *Singh* (1); *Jagannath Prasad Gupta v. Runjit Singh* (2);
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Cohen, K.C., replied, contending that the suit was barred by Act IX. of 1871 and could not be revived by Act XV. of 1877, and relying on the case in 24th Bombay Reports.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from a judgment and decree of the Court of the Judicial Commissioner of Oudh, affirming a decree of the Subordinate Judge of Lucknow.

The matter in dispute is the title to the Taluqa of Samarpaha, in the district of Rae Bareilly, in Oudh. The appellant's claim is based on an alleged adoption. The respondent claims as next heir under Act I. of 1869, s. 22, clause 6.

The last male owner of the Taluqa was Thakur Basant Singh. He died on November 12, 1857. His next heir was his widow Thakurain Daryao Kunwar. After the confiscation of proprietary rights in Oudh by the proclamation of March, 1858, a summary settlement of the Taluqa was made with her on May 10, 1858, and a sanad was afterwards granted to her. On the preparation of the lists of taluqdars in accordance with the provisions of Act I. of 1869, her name was entered in lists 1 and 2. It is not disputed that the Thakurain became taluqdar, not in right of her husband Basant Singh, but in her own right.

The Thakurain died intestate on November 13, 1893. Shortly after her death, the appellant's father, Thakur Sher Bahadur Singh, being found in possession and claiming under an adoption alleged to have been made in his favour by the Thakurain after her husband's death, had his name entered by the Deputy Commissioner in her place in the Revenue register.

On May 27, 1899, the respondent, who attained majority in June, 1896, instituted the present suit, claiming to succeed as next heir in right of his grandfather, who was the eldest brother of the Thakurain.

Both Courts decided in favour of the plaintiff. The defendants

(1) I. L. R. 27 Calc. 242, 254.

(3) I. L. R. 24 Bomb. 260.

(2) (1897) I. L. R. 25 Calc 354,
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(4) (1902) I. L. R. 26 Madr. 291,
297.

appealed to His Majesty in Council, having obtained a certificate to the effect that the case fulfilled the requirements of s. 596 of the Code of Civil Procedure, and that the appeal involved substantial questions of law.

Many questions were raised in the Courts below which have now disappeared, or were argued so faintly before their Lordships that it is not worth while to discuss them.

The main contest throughout has been in regard to the alleged adoption of Thakur Sher Bahadur Singh. On this point there was a difference of opinion in the Courts below. The Subordinate Judge held that there was an adoption in fact, attended with the ordinary ceremonies of adoption, although it was invalid because the Thakurain had not the authority of her husband in the matter. The Court of the Judicial Commissioner held that there was no adoption in fact, but only a nomination of the defendant as the Thakurain's heir, or, in other words, an adoption in a popular sense.

On the appeal before their Lordships it was argued that there was at any rate an apparent adoption, and that, on that assumption, it mattered not whether the adoption was valid or invalid, because there was enough to satisfy the provisions of the Limitation Act of 1871, as interpreted by this Board in the case of *Jagadamba Chowdhurani v. Dakhina Mohun*. (1) Mr. Cohen, who argued the case with great ability, relied entirely on the Act of 1871. He contended that the Limitation Act of 1877 did not apply because the appellant relied on title acquired before the passing of the Act of 1877, and his rights were therefore saved by s. 2 of that Act. He admitted that if the Act of 1877 applied, his client was out of Court.

Their Lordships are unable to accede to Mr. Cohen's argument. Giving full effect to the *Jagadamba Case* (1) and the other cases which followed it, they do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption amounts to acquisition of title within the meaning of s. 2 of the Act of 1877.

Their Lordships think that the appeal may be disposed of on this short ground, whether the alleged adoption was or was not

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(1) L. R. 13 Ind. Ap. 84.

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an apparent adoption to which the ruling in the *Jagadamba Case* (1) would apply if the Act of 1871 were now in force.

Their Lordships do not think it necessary to enter upon a consideration of the other difficulties in the way of the appellant. But they may observe in passing that if they had to choose between the opposite views of the Courts below as to the so-called adoption their Lordships would be disposed to prefer the view of the Judicial Commissioner. They may add that they are not satisfied that the finding of the Commissioner of Rae Bareilly in 1878 in the suit between the Thakurain and the appellant (reported at an earlier stage before the Privy Council, 3 I. L. R., Calcutta, 645) on the issue of adoption or no adoption would not be fatal to the appellant's case. Whatever objections there may have been to that issue being raised before the Commissioner on remand, both parties accepted it. It was treated as the main question in the suit. The issue was decided adversely to the appellant. The appellant abandoned an appeal to the Privy Council which he had begun, and so the decision became final. Having regard to the language of the Code of Civil Procedure, s. 13, which deals with issues as well as suits, it would seem that the finding on the issue as to adoption must be treated as *res judicata*. This point, however, was only touched upon in the argument, and their Lordships therefore abstain from expressing a final opinion on the question.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

The appellant will pay the costs of the appeal.

Solicitor for appellant: *Solicitor, India office.*

Solicitors for respondent: *T. L. Wilson & Co.*

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 SETH RUPCHAND DEFENDANT. May 11, 25.

ON APPEAL FROM THE COURT OF THE JUDICIAL
 COMMISSIONER, CENTRAL PROVINCES.

*Law of Limitation—Act XV. of 1877, s. 19—Acknowledgment of Liability—
 Admission of open and current Accounts—Construction.*

Objections having been filed to a debtor's application as an executor for probate of the will of his deceased creditor, the debtor replied in a written statement signed by himself before the statutory period had run out and containing these words: "For the last five years he had open and current accounts with the deceased. The alleged indebtedness does not affect his right to apply for probate":—

Held, in a suit to recover an admitted balance of account from the debtor, that this was a sufficient acknowledgment of his liability within the meaning of s. 19 of Act XV. of 1877. It was a clear admission of open and current accounts, that either party had a right to an account, and that whoever turned out to be debtor was bound to pay.

In re River Steamer Co., Mitchell's Claim, (1871) L. R. 6 Ch. 822, to the effect that a conditional promise to pay, the condition being performed, is a binding acknowledgment of debt, approved and held applicable to the construction of the Indian Act.

APPEAL from a decree of the Court of the Judicial Commissioner (October 28, 1903), affirming a decree of the Divisional Judge of the Nerbudda Division (October 22, 1902), which affirmed a decree of the Civil Judge of Khandwa (June 16, 1902).

Two questions were involved in the appeal—(1.) whether a statement contained in a written statement filed by the respondent amounts to an acknowledgment of his liability in respect of the sum sued for within the meaning of s. 19 of the Indian Limitation Act, 1877; and (2.) whether the respondent intermeddled with the estate of his deceased creditor as executor, and if he did, whether his intermeddling with such estate saved the appellant's right of suit from being barred by limitation.

The suit was brought on September 5, 1901, under the circumstances stated in their Lordships' judgment, by the appellant to

* *Present*: LORD MACNAGHTEN, SIR ANDREW SCOBLE, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

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recover principal and interest due by the respondent as shewn by the accounts of Motiram, the deceased creditor, who carried on business as a banker. The transactions between them terminated on May 12, 1898. The respondent pleaded the Statute of Limitations, relying on art. 57 of the Second Schedule, which prescribes a three years' period. The appellant replied that "the accounts between the parties are open and current accounts, and there has been also during the dealings reciprocal demands between them, who were both big bankers"; that "the defendant has also acknowledged his liability on September 28, 1899, and has again admitted his liability on July 4, 1901, and thereby has given fresh starting point for limitation if it is held that the dealings were not mutual, open and current account within the meaning of article 85 of the Limitation Act"; and that the respondent having acted as executor of the will of Motiram Seth from the time of his death till the final rejection of the application for probate by the Judicial Commissioner, i.e., till November 30, 1900, stood in a fiduciary relation to the appellant, and could not claim to take advantage of his position, and the suit was saved by the provisions of s. 10 of the Limitation Act.

Article 85 is as follows: "For the balance due on a mutual, open and current account where there have been reciprocal demands between the parties—three years—the close of the year in which the last item admitted or proved is entered into the account; such year to be computed as in the account."

Sect. 10 is as follows: "Notwithstanding anything hereinbefore contained no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property shall be barred by any length of time."

The Civil Judge was of opinion that the cause of action in regard to each payment arose at the time the money was paid, and that the suit having been brought on September 5, 1901, i.e., more than three years after the date of the last payment, was barred by limitation under Act XV. of 1877, Sched. II., art. 57.

He was also of opinion that the suit was not governed by art. 85 of the said schedule as being a suit "for the balance due on a mutual, open and current account where there have been reciprocal demands between the parties." He decided that the period of limitation could not be extended on any of the grounds on which the extension was claimed, finding that the statement in the petition dated September 28, 1899, was not an acknowledgment of liability; that the acknowledgment of liability contained in the deposition of Rupchand made on July 4, 1901, was not signed by him, and "that the defendant did not administer Motiram's estate so as to enable the plaintiff to get an extension of the period of limitation for this suit."

The first appellate Court affirmed this judgment, and the Court of the Judicial Commissioner concurred in the findings of the two Courts that the suit was barred by limitation. It further held that the respondent was not liable as a trustee under either s. 87 or s. 88 of the Indian Trusts Act (II. of 1882).

De Gruyther, for the appellant, contended that the Courts in India had erred in holding that the suit was governed by art. 57 instead of art. 85 in the Second Schedule to the Limitation Act. The suit was for the balance of a mutual and current account between the parties, and the cause of action arose on the last day of the year which contained the last item proved or admitted. The absence of a shifting balance was not conclusive as to the absence of mutuality in the account. Reference was made to *Hajee Syud Mahomed v. Ashrufoonnissa* (1); *Velu Pillai v. Ghose Mahomed* (2); *Ganesh v. Gyapu*. (3) Even if s. 85 applied, the period of limitation was extended by a valid acknowledgment of liability within the meaning of s. 19. The petition of September 28, 1899, was signed by the respondent, and contains a clear admission of open and concurrent accounts with the deceased. That is a sufficient acknowledgment of liability involving a promise to pay on settlement of the account, and satisfies s. 19: see the English authorities as to the effect of admitting a creditor's right to have accounts taken—*Prance v.*

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(1) (1880) I. L. R. 5 Calc. 759. (2) (1893) I. L. R. 17 Madr. 293.

(3) (1897) I. L. R. 22 Bomb. 606.

J. C. *Sympson* (1) ; *Banner v. Berridge* (2) ; *In re River Steamer Co., Mitchell's Case.* (3)

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These cases have been followed in India and held applicable to the Indian Act : see *Sittaya v. Rangareddi* (4) ; *Fink v. Buldeo Dass* (5) ; *Vasudeo Anant v. Ram Krishna Rao Narayan.* (6)

Besides, the respondent could not set up the bar of limitation, since he was trustee under his creditor's will, and had acted in the administration of his estate either by virtue of a valid appointment or as executor de son tort : see ss. 87 and 88 of the Trusts Act (II. of 1882). His petition contained an admission that he meddled in the management of the estate, and there are concurrent findings of fact to that effect, which, however, are not conclusive, for on examination they appear to be on mixed questions of law and fact. Reference was made to *Ingle v. Richards* (7) ; *Moosabhai Mahomed Sajan v. Yacoobhai Mahomed Sajan* (8) ; *Narayanasami Pillai v. Abhayi Sait.* (9)

C. W. Arathoon, for the respondent, contended that the findings of three Courts to the effect that the respondent did not intermeddle with Motiram's estate were conclusive and binding : see *Mussamat Durga Choudhrai v. Jwahir Singh Choudhri.* (10) Sect. 87 of the Trusts Act did not apply, for probate had been refused, the Court holding that the respondent and others had not been legally appointed executors. Even if he had intermeddled, he did not do so to the extent of becoming an executor de son tort within the meaning of the Indian Succession Act, ss. 265-266, if those sections are applicable to the case of a Hindu : see the exceptions there given. He referred to s. 9 of the Limitation Act, and contended that limitation had begun to run in Motiram's lifetime, and was not at any time suspended by any act or omission of the respondent. The acknowledgment relied upon as being contained in the petition of September 28, 1899, was not within the meaning of s. 19 : see *Jogeshwar Roy v. Raj*

(1) (1854) 1 Kay, 678.

(2) (1881) 18 Ch. D. 254, 274.

(3) L. R. 6 Ch. Ap. 822, 828.

(4) (1887) I. L. R. 10 Madr. 259.

(5) (1899) I. L. R. 26 Calc. 715.

(6) (1900) I. L. R. 24 Bomb. 394.

(7) (1860) 28 Beav. 366.

(8) (1904) I. L. R. 29 Bomb. 267, 283.

(9) (1905) I. L. R. 28 Madr. 351.

(10) (1890) L. R. 17 Ind. Ap. 122,

127, 128.

Narain Mitter (1) ; *Hajee Syud Mahomed v. Ashrufoonnissa* (2) ;
Velu Pillai v. Ghose Mahomed (3) ; *Ganesh v. Gyamu*. (4)

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There was no agreement express or implied that any accounts should be settled between the parties. In fact there were no mutual and current accounts in the ordinary mercantile sense. They consisted of items of advance by the deceased and of part payments by the respondent, who was always in debt on the account. There were no reciprocal demands between the parties, and accordingly art. 85 of the Limitation Act did not apply. He referred to art. 57.

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De Gruyther replied, citing *Sukhamoni Chowdhurani v. Ishan Chunder Roy*. (5)

The judgment of their Lordships was delivered by

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May 25.

SIR ALFRED WILLS. One Motiram, of whom the appellant (the plaintiff in the action) is the adopted son, and one Rupchand, the respondent and the defendant in the action, were mahajans or money-dealers, both residents of Burhanpur, in the Central Provinces. They had regular dealings with one another from July 21, 1895, to May 12, 1898, and at the close of these dealings the respondent owed Motiram Rs.5841. 9. 1 on account of principal and Rs.2801. 2. 0 on account of interest. No question has been raised as to the correctness of these amounts if the action be maintainable.

The present suit was brought on September 5, 1901, to recover these amounts. There is no question that they were due. The respondent admitted in his pleading that they were so, and the only defence is that the action was barred by the lapse of time.

Motiram died on October 6, 1898, leaving a will by which the respondent and four other persons were appointed trustees to administer the estate. Three of them, of whom the respondent was one, applied for probate. The application was opposed by the other two and by Kisandas, the natural father of the appellant. Their petition of objections is not in the record, but the

(1) (1903) I. L. R. 31 Calc. 195.

(3) I. L. R. 17 Madr. 293.

(2) I. L. R. 5 Calc. 759.

(4) (1897) I. L. R. 22 Bomb. 606.

(5) (1898) L. R. 25 Ind. Ap. 95.

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reply, signed by the respondent and others, is set out, and from it there can be no doubt that amongst the objections was one on the ground that the respondent owed money to the estate. Paragraph 3 is as follows: "The applicant Rupchand Nanabhai is a big Mahajan of Burhanpur paying Rs.106 as income tax. For the last five years he had open and current accounts with the deceased. The alleged indebtedness does not affect his right to apply for probate." This document is dated September 20, 1899.

The application for probate failed on the ground that the applicants were not legally appointed executors.

There was no application for letters of administration, but in 1901 Kisandas applied for a certificate of guardianship, an application which was opposed by the widow, and in the result Ranchordas, one of Motiram's head agents, was appointed interim receiver of the estate until the question of a certificate of guardianship was disposed of.

Ranchordas, as next friend of the infant plaintiff, instituted the present suit, and on December 4, 1901, Kisandas, having obtained the certificate of guardianship, was substituted for him.

A question has been raised as to whether the dealings between the respondent and Motiram were mutual as well as open and current, and involved reciprocal demands between the parties so as to make art. 85 of the Indian Limitation Act (No. XV. of 1877), Sched. II., applicable. The dealings were certainly not the ordinary ones of banker and customer, but rather in the nature of mutual accommodation, but the view which their Lordships take makes it unnecessary to consider this question, and for the purposes of this case the controversy may be treated as if the sum due to Motiram was a simple debt or series of debts none of which were incurred before September 28, 1896, since as late as January 24, 1897, Motiram, as appears by the summary of accounts appended to the judgment of the Civil Judge (the Court of First Instance), had drawn against the respondent for more than the respondent had drawn against him.

The last item against the respondent in account between them is dated May 12, 1898, and the indebtedness for principal must

therefore have been incurred between January 24, 1897, and May 12, 1898, and the periods of limitation applicable to the several components of the total demand for principal would expire at various dates between January 24, 1900, and May 12, 1901. And in the absence of a sufficient acknowledgment before such periods had arrived the debt or debts would be barred.

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An acknowledgment according to the Indian Act must be signed by the party to be affected by it, and the only document which can be relied upon as an acknowledgment signed by the respondent is the statement filed by the respondent in the proceedings touching the application for probate, the material part of which has been already set out, but which it is convenient here to repeat. "For the last five years he" (the respondent) "had open and current accounts with the deceased." There can be no doubt that the five years spoken of are the five years before the death of Motiram, i.e., before October 6, 1898. On that date the whole of the indebtedness other than interest had been incurred, there having been no dealings since May 12, 1898. There is, therefore, a clear admission that there were open and current accounts between the parties at the death of Motiram. The legal consequence would be that at that date either of them had a right as against the other to an account. It follows equally that whoever on the account should be shewn to be the debtor to the other was bound to pay his debt to the other, and it appears to their Lordships that the inevitable deduction from this admission is that the respondent acknowledged his liability to pay his debt to Motiram or his representative if the balance should be ascertained to be against him.

The question is whether this is sufficient by the Indian law to take the case out of the statute.

It has been already pointed out that the acknowledgment was made before the statutory period had run out. Thus one requisite of s. 19 is complied with. The necessity of signature by the party to be charged is also complied with. The acknowledgment is not addressed to the person entitled, but according to the "explanation" given in s. 19 this is not necessary. We have, therefore, the bare question of whether an acknowledgment of liability, if

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Their Lordships can see no reason for drawing any distinction in this respect between the English and the Indian law. The question is whether a given state of circumstances falls within the natural meaning of a word which is not a word of art, but an ordinary word of the English language, and this question is clear of any extraneous complications imposed by the statute law of either England or India.

In a case of very great weight, the authority of which has never been called in question, Mellish L.J. laid it down that an acknowledgment to take the case out of the Statute of Limitations must be either one from which an absolute promise to pay can be inferred or, secondly, an unconditional promise to pay the specific debt, or, thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed: *In re River Steamer Co., Mitchell's Claim.* (1) An unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference if nothing is said to the contrary. It is what every honest man would mean to do. There can be no reason for giving a different meaning to an acknowledgment that there is a right to have the accounts settled, and no qualification of the natural inference that whoever is the creditor shall be paid when the condition is performed by the ascertainment of a balance in favour of the claimant. It is a case of the third proposition of Mellish L.J., a conditional promise to pay and the condition performed.

There was therefore on September 28, 1899, a sufficient acknowledgment to give a new period of limitation from the date of the acknowledgment, viz., September 28, 1899, and the present suit having been commenced on September 5, 1901, is within any period of limitation that can be applicable.

The acknowledgment to which attention has been directed is followed in the same paragraph by the following sentence: "The alleged indebtedness does not affect his" (the respondent's) "right to apply for probate." Stress was laid by the Civil Judge upon the word "alleged." He was of opinion that the word

"had" in the sentence "for the last five years he had open and current accounts with the deceased" and the word "alleged" were fatal to the validity of the acknowledgment. Their Lordships cannot share this opinion. The first sentence shews that there were open accounts at the death of Motiram. If nothing further is alleged the natural presumption is that they continued unsettled at the time the statement was made. The sentence which follows is perfectly consistent with this admission. The meaning is "even if there is a balance against the respondent that does not disqualify him from fulfilling the duties of an executor," and it has been pointed out that what is relied upon here is an acknowledgment subject to the condition that an adverse balance really exists, and the condition is fulfilled in fact.

The judgment in the Divisional Judge's Court is also against the acknowledgment. The only reason given is that it would require a considerable stretch of the imagination to place upon it the meaning that there was a right to have the account taken, thereby implying a promise to pay. It has not, however, been argued that there was a promise to pay in any event, and the learned judge does not seem to have considered the meaning, which appears to their Lordships to be the natural one, that the words import an admission of liability if the balance should prove to be against the respondent coupled with the fulfilment of that condition—a state of things which in all reason and sound sense places the acknowledgment upon the same footing as an acknowledgment unconditional in the first instance, from which, in English law, a promise to pay has always been inferred. The Indian Limitation Act, s. 19, however, says nothing about a promise to pay, and requires only a definite admission of liability, as to which there can be no reason for departing from the English principle that an unqualified admission and an admission qualified by a condition which is fulfilled stand upon precisely the same footing.

The view taken by the Judicial Commissioner is again one with which their Lordships are unable to agree.

He refers to a case of *Sitayya v. Rangareddi and Others* (1), in which it was held that an acknowledgment of the plaintiff's

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right to have accounts taken and of the defendants' liability to pay any balance (if such there should be) against him was held to satisfy s. 19 of the Limitation Act. But this decision appeared to him to be either erroneous or inapplicable, because it is based upon two English cases, *Prance v. Simpson* (1) and *Banner v. Berridge* (2), in which similar acknowledgments were held to satisfy the English law upon the subject, the acknowledgment in *Prance v. Simpson* (1) being undistinguishable from that relied upon in the present case. He goes on to give as his reason for considering that the English cases do not apply in the present case the fact that the English law requires words from which a promise to pay may be inferred, whereas the Indian Act requires words from which an admission of liability may be inferred. But in English law it is the acknowledgment of liability which is the ground upon which a promise to pay is inferred, so that the requirements of English law are, if anything, more, and not less, stringent than those of Indian law, which seems to be a bad reason for holding that the English cases have no application to the present inquiry. The learned Judicial Commissioner further agrees with the Civil Judge in holding that the expression "alleged indebtedness" is a stumbling block in the way of the appellant, a view upon which their Lordships have already expressed their opinion.

In the opinion of their Lordships, therefore, the acknowledgment of September 28, 1899, is sufficient to prevent the claim of the appellant from being barred by the Limitation Act. It is, therefore, unnecessary to discuss the other grounds upon which the appellant has relied. Their Lordships would notice only one point in connection with them. The appellant contended that the respondent, whether appointed executor by the will or not, had intermeddled with the property of the deceased, and was at all events executor de son tort, and therefore not entitled to the benefit of the Limitation Act. The respondent has in this suit admitted in the most definite manner that he did so. In spite of this admission each of the three Courts below has held that he did not, and the respondent's counsel claimed that this was a decision of a matter of fact, and that however

(1) 1 Kay, 678.

(2) 18 Ch. D. 254.

erroneous it might be, it would be contrary to the practice of the Judicial Committee to entertain the question of its reversal. A careful perusal of the judgments, however, makes it perfectly clear that the only reason for the view taken by the Courts below was that they thought the respondent had not been duly appointed executor, and therefore could not have intermeddled with the estate so as to make himself responsible as executor. Their decision was therefore really one of law, and not of fact, and is open to reconsideration.

Their Lordships will humbly advise His Majesty that the judgments appealed against be reversed and judgment entered for the appellant for the principal claimed, with interest at the rate of 7 annas 9 pie per cent. per mensem to date of suit, and thereafter at the rate of 6 per cent. per annum till payment, and that the respondent be ordered to pay the costs of the appellant in each of the Courts below. The respondent will also pay the costs of this appeal.

Solicitors for appellant: *Rubinstein & Co.*

Solicitors for respondent: *T. L. Wilson & Co.*

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 AND
 Feb. 23, 27, HUNRAJ MORARJI AND ANOTHER . . . DEFENDANTS.
 28;
 May 9.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Hindu Law of Inheritance in Bombay—Stridhan—Mitakshara, c. ii., s. 11, verses 8, 9 and 11—Mayukha, c. iv., s. 10, verses 28 and 30—Hindu Widow dying without Issue—Preferential Rights of Co-widow—Claims of Husband's Brother or his Son.

Questions on the Hindu law of inheritance to property in the island of Bombay are to be determined in accordance with the Mitakshara, subject to any varying doctrine contained in the Mayukha, ascertained after construing both treatises so as to harmonize with one another wherever and so far as that is reasonably possible.

By the Mitakshara, c. ii., s. 11, verses 8, 9 and 11, a Hindu co-widow is entitled to succeed to the stridhan of a widow dying without issue in preference to her husband's brother or brother's son.

The Mayukha, c. iv., s. 10, verses 28 and 30, does not on its true construction alter or supersede the doctrine of the Mitakshara. By the former verse her heirs are described as her nearest sapindas in her husband's or her father's family according to the form of her marriage. The co-widow is not excluded, nor is any new order of succession prescribed. She takes, therefore, in the order prescribed by the Mitakshara. That unambiguous direction cannot be controlled by the uncertain language of verse 30. The true construction of that verse, bringing it into harmony with verse 28 and the Mitakshara, is that the relations of the husband or the father succeed according to the form of marriage; but the list of heirs is given promiscuously and is not exhaustive, nor is there any indication of an intention to alter or supersede the order or succession previously prescribed.

APPEAL from a decree of the High Court (February 10, 1904), reversing a decree of Batty J. (February 21, 1903) and dismissing the appellant's suit. The question between the parties was one of law, whether the appellant is the preferential heir according to the Hindu law of the Bombay school of a Hindu widow named Bachubai, who died childless and intestate on May 9, 1899.

The property in dispute is a house in Bombay which was

* *Present*: LORD DAVEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

Bachubai's stridhan, and of which she died possessed. The claimants thereto were the appellant, the surviving co-widow of Bachubai's husband Koreji Haridass, who had conveyed absolutely the property to Bachubai on November 24, 1892, in contemplation of marriage; the first respondent Hunsraj Morarji, who was the separated nephew of Koreji, being the son of his eldest brother, who predeceased Bachubai; the second respondent Bai Monghibai, who was the widow of a younger brother of Koreji named Ranchordas Haridass, who survived the widow.

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The issues fixed were (1.)—whether, on the death of Bachubai, Ranchordas Haridass was not the heir of Bachubai and succeeded to the property mentioned in the plaint; (2.) whether the first defendant, as widow and heir of Ranchordas, is not entitled to the property the subject-matter of this suit (as the heir of Ranchordas Haridass); (3.) whether the plaintiff is entitled to succeed.

Batty J. decided that the deed of gift dated November 24, 1892, conferred on Bachubai an absolute estate in the property as stridhan; and that by the Hindu law of the Bombay school the plaintiff was next heir to Bachubai and entitled to succeed. He accordingly made a decree granting the appellant (plaintiff) possession of the property in dispute and directing account to be taken of the rents and profits.

His judgment, after referring to *Manilal Rewadat v. Bai Rewa* (1), relied on by the plaintiff as shewing that the heir to succeed is the nearest to the woman herself though in her husband's family, and to *Vijiarangum v. Lakshan* (2), relied upon by the defendant No. 2, proceeded as follows:—

“The decision in *Vijiarangum's Case* (2) is undoubtedly binding on this Court. It is cited by Banerjee (Hindu Law of Marriage and Stridhan, Tagore Lectures, 1878, 2nd ed. p. 364) as in accordance with Kamalakar's interpretation of Vijnyanesvara's rule that the successive heirs after the husband would be the step-son, the step-grandson, the rival wife, the step-daughter, her son, the husband's mother, his father, his brothers, their sons, and the husband's other gotraja sapindas and bandhus in the order in

(1) (1892) I. L. R. 17 Bomb. 758. (2) (1871) 8 Bomb. H. C. R. 244; 260 O. C. J.

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which they inherit his property. And this rule is as stated, p. 362, that given in the Mitakshara for the devolution of the property of a male owner dying without issue.

“The Mayukha treating of parabhashika stridhan or stridhan proper of a widow when the marriage is in the Brahma, or other unblamed form, recognizes the husband and his kinsmen as the heirs, basing its rule on the same text of Yajnavalkya that is followed in the Mitakshara on the subject, and if there be no husband, then the nearest to her in his own family takes it; the heirs being necessarily the sister's son, the husband's sister's son, the husband's brother's son, the brother's son, the son-in-law, and the husband's younger brother in succession. But the point of bifurcation where the Mitakshara and Mayukha separate appears to be a point (below the widow in the series of successive heirs) at which the question arises as to the order of succession among the husband's kinsmen.

“In *Gojabai v. Shrimant Shahajirao Maloji Raje Bhosle* (1) the wife is spoken of as having been born again in the husband's family, so that, she having become half the body of her husband, the son of a man by one of his wives is the son of all his wives, and it is for this reason (2) that the step-son is treated, not as the husband's sapinda, but as an actual son of a widow whose stridhan is in question. It is not as a sapinda but as her own offspring that he takes precedence, and is the sapinda of his step-mother, who is therefore not to be regarded as childless. It is thus that he is regarded as coming in before the husband himself, owing to the absolute identity of the widow with her husband. This identity of the widow with her husband appears to have been the ground of decision in the case of *Gojabai*, and is the reason why the step-son in that case was held to come in even before the co-widow who opposed his claims as he would apparently have done even before the husband. But when there are no children and the husband is next entitled the widow of the husband, being identified with him as half of his body, seems equally entitled to precedence before the question can arise as to who are the nearest heirs in default of the husband. The husband's kin are, I think, in view of this decision, by which I am bound,

(1) (1892) I. L. R. 17 Bomb. 114.

(2) Ibid. 120, 121.

excluded by the husband himself as represented by the co-widow who survived him. This seems to be in accordance with the passage in Telang J.'s judgment, in which he observes that according to the view of some writers the step-son or step-grandson comes in next after the offspring of the woman herself, and before her husband; and that according to the view of others he would come in after the husband, but before his other wives and such other wives' daughters, and, *of course*, before other more distant heirs, including the brother's son.

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"The remarks that follow this passage indicate that it is the recognized identity of the wife with her husband that entitle a co-widow's children, and a co-widow herself, to take precedence respectively as sapindas of the wife herself, or as representing the husband himself, before resort is had to the husband's sapindas at all. For the above reasons I think the plaintiff is entitled to the relief sought."

Hunsraj Morarji appealed, making Bai Kesserbai and Bai Monghibai respondents. The latter also filed objections to the decree under s. 561, Act XIV. of 1882 (Civil Procedure Code). In the High Court it was conceded that under the deed of gift Bachubai took a limited interest and that her legal heirs took as purchasers. The High Court decided that whatever class of stridhan the property may have been in the hands of Bachubai, by the terms of the deed of gift the persons entitled to succeed as heirs to Bachubai were the persons entitled to succeed to her ordinary stridhan. It held that Bai Kesserbai was not under the Hindu law of the Bombay school the next heir to Bachubai's ordinary stridhan, and dismissed the suit with costs.

The material portion of the Chief Justice's judgment was as follows:—

"Before us for the first time it has been argued that the legal heir of Bachubai must be determined by reference to the peculiar course of descent of the type of stridhan called sulka: and this view has been supported before us by a very able argument advanced by Mr. Setlur. But there are many difficulties in the way of accepting this contention. In the first place the devolution of sulka does not correspond with the course of succession delineated in the deed of November 24, 1892. In the next place

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the interest of Bachubai was not (as sulka is) hereditary; she took merely a limited interest, and her legal heirs do not take as such, but because they fall within the description of the donees under the terms of the deed. Then, again, even if it could be said that the limited interest taken by Bachubai under the deed was a modernized form of sulka, it still would be a question whether the heirs to take under the gift should be ascertained by reference to that form of stridhan. The quality of the subject-matter does not necessarily affect the meaning of the word 'heirs,' and in illustration of this I may refer to *Garland v. Beverley* (1), where it was held that in a gift of gavelkind land to the right heir of a person, it was the right heir according to common law and not in reference to the descent of gavelkind that took under the gift. So here it is at least an arguable point, even if Bachubai's limited interest could be regarded as sulka, whether the effect of the gift to her heirs is or is not to be determined by reference to the exceptional course of descent peculiar to that particular class of stridhan. It would be undesirable to dispose of this appeal, on a point involving so much of doubt, which might have been cleared by evidence had it been raised at an earlier stage.

"The possibilities in this direction are exemplified by Sir Charles Sargent's decision in the P. J. for 1893: *Chunilal v. Itchachand* (2). Therefore I prefer to rest my opinion on the hypothesis (which I will assume for the purpose of this case) that the legal heirs indicated are those who would be entitled to Bachubai's ordinary stridhan. Now let me test the case in the first instance with reference to the descent of technical stridhan. Admittedly this case is governed by the Mayukha, which differs from the Mitakshara in its treatment of the descent of stridhan in that it imports the rule of devolution derived from the text of Brihaspati. This rule is not introduced absolutely, but with the qualification that it comes into effect on failure of the husband.

"In the course of his judgment Batty J. refers to this rule, and in reference to it says 'the point of bifurcation where the Mitakshara and Mayukha separate appears to be a point (below the widow in the series of successive heirs) at which question

(1) (1878) 9 Ch. D. 213.

(2) (1893) P. J. 88.

arises as to the order of succession among the husband's kinsmen.' From the succeeding passage of the judgment it would appear that the position there ascribed to the widow depends upon her identification with her husband in the sense there indicated. But I am aware of no passage in the *Mayukha* that can be taken as a warrant for this identification, or for the conclusion that when Nilakantha uses the word 'husband,' as he does in reference to the passage of Brihaspati, he includes in it the wife. Batty J., in support of this view and as authority for it, relies on the judgment of Telang J. in the case of *Gojabai v. Shahajirao* (1); but that case turned upon the *Mitakshara*, and at pp. 122 and 123 Telang J. points this out. He there deals specifically with Brihaspati's text, and no doubt subjects it to a certain amount of criticism; he suggests a want of harmony between the rule deduced by Nilakantha from Yajnavalkya and the enumeration of heirs in Brihaspati's text, and contends that some of those named in the text would not answer the description of being nearest in the husband's family. But this criticism appears to me to lose sight of the fiction on which the text is based; this is how the passage runs in the *Mayukha*: see Mandlik, p. 98, 'on failure of the husband,' to 'the daughter's son.' This involves the consequence that the sister's son, the husband's sister's son, the husband's brother's son, the brother's son, the son-in-law, and the husband's younger brother are equal to sons.

"They obviously are not sons in fact, but a fiction is here created whereby they stand in the position of sons, and were the facts in accordance with the fiction (as must be assumed), then there would be no inconsistency and no want of harmony.

"It will be noticed that the fiction only arises on failure of issue and of the husband, but in that I can find nothing that saves the right (if any) of the rival widow against these fictional heirs. At first sight the fiction no doubt appears capricious and unreasonable, but it would appear to be not without foundation. An interesting light is thrown on this subject by Mr. Golapchunder Sarkar in his work on Hindu Law, pp. 328, 329. As far as I can learn, what he there depicts presents a substantially accurate

(1) I. L. R. 17 Bomb. 114.

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representation of relations in Bombay. The conclusion, then, to which I come is that, as at Bachubai's death she left surviving her a younger brother and a nephew of her husband, her rival widow cannot claim to have been her heir."

Cohen, K.C., and De Gruyther, for the appellant, contended that by the Hindu law of the Bombay school she was entitled, on the death of Bachubai, to succeed to the stridhan in suit as the deceased's co-widow. The applicable law was that which prevailed generally in Western India, that is, the Mitakshara controlled by the Vyavahara Mayukha on all points upon which those treatises differed. Reference was made to *Collector of Madura v. Moottoo Ramalinga Sathupathy* (1); *Lallubhai Bapubhai v. Mankuvarbai* (2); *Krishnaji Vyanktesh v. Pandurang*. (3) By the true construction of the deed of gift in this case Bachubai took an absolute estate in the property in suit as her stridhan. The rule of succession thereto was prescribed by the Mitakshara, c. ii., s. 1, verses 5 and 6, Stokes' Hindu Law Book, p. 428; c. ii., s. 11, verse 1, Stokes, p. 458; Golapchundar Sarkar's Hindu Law Lectures, 1888, pp. 34, 283. The interpretation put upon these texts is to be found in *Mussumat Thakoor Dehee v. Rai Baluk Ram* (4), *Gojabai v. Shahajirao Maloji Raje Bhosle* (5), and *Krishnai v. Shripati*. (6) According to these texts the appellant is the preferential heir to Bachubai, who left neither husband nor issue of her husband, whether by herself or any co-wife, her surviving. The ground of her preference to her husband's collaterals is that she was married by one of the approved forms and is the nearest sapinda of her husband, therefore, by reason of her absolute identity with her husband as half of his body, the nearest sapinda of her co-widow. She represents her husband for the purposes of this succession. Then does the Mayukha control the Mitakshara on this point by laying down a different rule? Reference was made to the Mayukha, c. iv., s. 8, verse 19; Stokes, p. 89, c. iv., s. 10, verses 27, 28, 30; Stokes,

(1) (1868) 12 Moo. Ind. Ap. 435.

(4) (1866) 11 Moo. Ind. Ap. 139.

(2) (1876) I. L. R. 2 Bomb. 388,
417.

(5) I. L. R. 17 Bomb. 114, 117.

(3) (1875) 12 Bomb. H. C. 66.

(6) (1905) I. L. R. 30 Bomb. 333;
8 Bombay L. Reporter 12.

p. 105. It was contended that the Mitakshara and Mayukha must be construed so as to harmonize with one another so far as that is possible. The 28th verse did not prescribe any different order of succession from the Mitakshara. In that verse the heirs of the wife are described as the nearest sapindas of the wife in the husband's family, or the nearest to her in her father's family, as the case may be. The list given is not exhaustive, it does not exclude the co-widow or any other sapinda of the husband, and it does not proceed on any new order of succession from that prescribed by the Mitakshara. So far, therefore, the Mayukha does not control the leading treatise. Then as regards verse 30, it is too uncertain in its language and meaning to be capable by itself of introducing a new order of succession not shewn to have been contemplated by verse 28. The difficulty arises with this verse which refers to a text of Brihaspati. But if that verse is construed distributively according as the woman who is the root of descent was married according to one of the approved forms or in one of the lower forms its inconsistency with verse 28 and with the Mitakshara can be obviated. The result will be that in the one case her husband's relations will succeed, in the other her father's relations will succeed. The text gives the two classes of heirs promiscuously and partially, and enumerates them in an order which is at variance with recognized principles of Hindu inheritance. By recognizing that no order of succession is prescribed and that two classes of heirs are mixed up together it is possible to construe verse 30 in a way which will not conflict with the earlier verse or with the Mitakshara; and that construction ought, therefore, to be adopted. Reference was made to *Bachha Jha v. Jugman Jha* (1); *Lallubhai Bapubhai v. Mankuvarbai*. (2) See also the Dayabhaga, c. iv., s. 3; Stokes, p. 251; Mayne's Hindu Law, 6th ed. p. 38, ss. 500, 669; Shamachurn Sarkar's Vyavastha Chandrika, vol. ii., pp. 538, 539; Mitakshara, c. ii., s. 3, verse 5; Stokes, p. 443. *Mohandas v. Krishnabai* (3); *Daya Krama Sangraha*, c. ii., s. 6; Stokes, p. 498; Banerjee on Marriage and Stridhan (Tagore Lectures, 1878, p. 375; 2nd ed., p. 364); West

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(1) (1885) I. L. R. 12 Calc. 348, in appeal (1880) L. R. 7 Ind. 212, 351. 231.

(2) I. L. R. 2 Bomb. 388; S. C. (3) (1881) I. L. R. 5 Bomb. 597.

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and Bühler's Digest of Hindu Law, p. 517; *Gojabai v. Shahajirao Maloji Raje Bhosle* (1); *Rahi v. Govind Valad Teja*. (2) The result is that the Mayukha interprets the Mitakshara as meaning, not that her husband's sapindas inherit her stridhan, but that her nearest sapindas in her husband's family inherit. This points to the co-widow by a different process from that indicated in the Mitakshara, and accordingly there is no sufficient ground for saying that the order of succession prescribed by the Mitakshara has been in any efficient and operative manner controlled by the Mayukha. Accordingly by both authorities the co-widow succeeds to a childless widow's stridhan in preference to her husband's collateral relatives, including the brother's son or other representative.

Jardine, K.C., and *W. C. Bonnerjee*, for the first respondent, Hunsraj Morarji, son to the brother of Bachubai's husband, contended that, according to the Bombay school of Hindu law as expounded in the Vyavahara Mayukha, a co-widow cannot succeed to a woman's stridhan in preference to either her husband's younger brother or nephew. They agreed that Bachubai took an absolute estate in the property in suit. They referred to verses 28 and 30 of c. iv., s. 10, of the Mayukha, and contended that the latter controlled the former. Verse 28 was general in its meaning and terms, while verse 30 was more definite, and prescribed an enumeration of heirs and nearest kinsmen (after the failure of the husband) founded on the rule of devolution which it derived from the text of Brihaspati. The widow comes in as sapinda to the husband under verse 28, but her preferential claim depends upon her identification with her husband. That identity is the ground of a dictum in *Gojabai v. Shrimant* (3), to the effect that her step-son succeeds as her son before the husband himself, inasmuch as, on account of the step-son, she is not herself childless. That case, however, merely relates to the preferential claim of a step-son over a co-widow, and was decided under the Mitakshara. It is merely an obiter dictum as regards an issue between the co-widow and the husband or his collateral

(1) I. L. R. 17 Bomb. 114, 121, (2) (1875) I. L. R. 1 Bomb. 97, 123.

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(3) I. L. R. 17 Bomb. 114.

heirs. They are not excluded by the co-widow, whose identification with the husband is nowhere recognized in the Mayukha, or, indeed, by the other schools of Hindu law, except as regards inheritance to property belonging to him at the time of his death. Reference was made to *Venkata Subramaniam Chetti v. Thayaramma* (1), and to Golabchundar Sarkar's Tagore Lectures, pp. 328, 329; *Daya Krama Sangraha*, c. ii., s. 6; Stokes, p. 498; *Dayabhaga*, c. iv., s. 3, verse 32; Stokes, p. 257, and *Mitakshara*, c. ii., s. 1; Stokes, p. 427; Mayne's Hindu Law, 6th ed., par. 529, p. 698; *Rachava v. Kalingapa* (2); *Lulloobhoy v. Bappoobhoy v. Cassibai* (8); *Nahalchand Harakchand v. Hemchand* (4); *Bachha Jha v. Jugmon Jha* (5); *Dasharathi Kundu v. Bipin Behari Kundu* (6); *Hunsraj v. Bai Monghibai*. (7) It was contended that by the true construction of verse 30 above referred to, and by the effect of the authorities cited, the husband's sapindas—those at least who ranked, like the brother's son, as fictional or secondary sons—were entitled to succeed to his widow's stridhan in preference to the co-widow.

Ross, for the respondent Bai Monghibai, the widow of another brother of Bachubai's husband, who survived Bachubai, contended that the High Court was right in holding that the appellant was not entitled in preference to the respondents. He relied specially on the cases cited from the 21st vol. of the Madras series and the 7th Bombay Law Reporter; and also referred to Banerjee's Tagore Law Lectures, 1878 (2nd ed.), pp. 387 and 388, where the text of Brihaspati is paraphrased. He submitted that Nilakantha must be taken to have meant by verse 30, that the secondary sons mentioned in that text came in between the husband and his nearest sapindas, and also before the widow's sapindas in her husband's family. According to him that text stated the true order of succession as between the heirs there enumerated, and gave precedence to all of them over those heirs who were "nearest to her in her husband's family."

Cohen, K.C., replied.

(1) (1898) I. L. R. 21 Madr. 263, 267.

(2) (1892) I. L. R. 16 Bomb. 716.

(3) (1880) L. R. 7 Ind. Ap. 212.

(4) (1884) I. L. R. 9 Bomb. 31.

(5) I. L. R. 12 Calc. 348.

(6) (1904) I. L. R. 32 Calc. 261.

(7) (1904) 7 Bombay L. Reporter 622, 627.

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The judgment of their Lordships was delivered by

LORD DAVEY. The question in this appeal relates to the succession to immovable property in the island of Bombay, of which a Hindu lady named Kumari Bachubai died possessed. She was the widow of one Koreji Haridass, who died in February, 1898. On November 24, 1892, Koreji Dass executed an antenuptial settlement of the property now in dispute, whereby he conveyed it to Kumari Bachubai, her heirs, executors, administrators, and assigns, for ever, subject to the following conditions:—

“1. If the said Kumari Bachubai shall die before the said intended marriage has been celebrated and completed then the said house, land, and premises shall revert to and again become the absolute property of the said Koreji Haridass, his heirs, executors, administrators, and assigns.

“2. If the said Kumari Bachubai shall die after the said intended marriage has been celebrated and completed without leaving issue of the said intended marriage who shall succeed to a vested interest in the said house, land, and premises, then the said house, land, and premises shall be dealt with as she may direct or declare by will or deed, or failing any will or deed, then the same shall vest in her legal heirs according to Hindu law of the Bombay school.”

The marriage was celebrated in February, 1893. Kumari Bachubai died on May 9, 1899, without leaving any issue and without having made any appointment by deed or will. It is not disputed that the persons entitled to succeed to the property as heirs of Kumari Bachubai were the persons entitled to her ordinary stridhan. The rival claimants are the appellant Bai Kesserbai, who was the surviving co-widow of Koreji Haridass, the respondent Bai Monghibai, who is the widow of Ranchordas Haridass, a brother of Koreji Haridass, who survived Kumari Bachubai and died on June 17, 1902 (it is presumed childless), and the respondent Hunsraj Morarji, who was the son of another brother of Koreji Haridass, who predeceased Kumari Bachubai. The appellant was the plaintiff in the suit, which was commenced on August 4, 1902, in the High Court of Bombay. Batty J. decided that by the Hindu law of the

Bombay School the appellant was the next heir to Kumari Bachubai, and entitled to succeed. This decision was reversed on appeal by the Chief Justice and Russell J., and by their decree, dated December 11, 1903, the suit was dismissed with costs.

It is stated in the judgment on the appeal that both sides abandoned the view taken by Batty J. that Kumari Bachubai, under the deed of gift, took an absolute interest in the property, and that it was conceded that she took a limited interest only, and her heirs took as purchasers. Both the learned judges were also of that opinion, and their judgments are, to a certain extent, based on it. Their Lordships are at a loss to understand on what grounds this opinion was arrived at. They have no doubt whatever that, whether the deed is to be construed according to English law, as Russell J. thought, or by Indian law, Kumari Bachubai took under it an absolute estate of inheritance.

Questions on the Hindu law of inheritance to property in the island of Bombay are to be determined in accordance with the Mitakshara, subject to the doctrine to be found in the Mayukha, where the latter differs from it. But, as laid down by Telang J. in *Gojabai v. Shrimant Shahajirao Maloji Raje Bhosle* (1), "Our general principle should be to construe the Mitakshara and the Mayukha so as to harmonize with one another wherever and so far as that is reasonably possible." The point now under discussion is whether a co-widow is entitled to succeed to the property of a widow dying without issue in preference to her husband's brother or brother's son. There has been no judicial decision on this question, and their Lordships must decide it on the construction of the texts of Mitakshara and the Mayukha read together, with such assistance as may be afforded by other commentaries (though not recognized as authorities in Bombay) and by modern text books.

If the case rested on the Mitakshara alone their Lordships are of opinion that the appellant would be entitled to succeed. The material texts of the Mitakshara are c. ii., s. 11, placita 8, 9 and 11; Stokes, Hindu Law Books, pp. 460, 461.

"8. A woman's property has been thus described. The

(1) I. L. R. 17 Bomb. 114, at p. 118.

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author next propounds the distribution of it: 'Her kinsmen take it if she died without issue.'

"9. If a woman die 'without issue,' that is, leaving no progeny the woman's property, as above described, shall be taken by her kinsmen; namely, her husband and the rest as will be [forthwith] explained.

"11. Of a woman dying without issue as before stated, and who had become a wife by any of the four modes of marriage denominated Brahma, &c. . . . , the [whole] property, as before described, belongs in the first place to her husband. On failure of him it goes to his nearest kinsmen [sapindas] allied by funeral oblations. But in the other forms of marriage, called asura, &c. . . . , the property of a childless woman goes to her parents, that is, to her father and mother."

There can be no reasonable doubt that according to the Mitakshara definition of sapinda husband and wife are sapindas to each other. In the case of *Lallubhai Bapubhai v. Mankuvarbai* (1) Sir Michael Westropp, after quoting a long passage from the Achara Kanda of the Mitakshara, said (2):—

"This shews that Vijnyanesvara abandoned the doctrine that the right to offer funeral oblations alone constituted sapinda-ship, and adopted in lieu of it the theory that sapinda-ship is based upon community of corporal particles, or, in other words, upon consanguinity, and that he maintained that there is such a community between the wives of collaterals."

The learned Chief Justice then shewed that the same theory had been adopted by Nikalantha, the author of the Mayukha, and that the doctrine applied to sapinda relationship, not only in its ceremonial aspect, but for the purposes of inheritance also. It was accordingly held in that case, which arose in the island of Bombay, that under the law of the Mitakshara and Mayukha the widow of a deceased first cousin succeeded in her husband's place in preference to a male of a remoter degree. In West and Bühler (Digest of the Hindu Law of Inheritance, p. 518) it is stated that whether "nearness" in the rule given by the Mitakshara for succession to childless widows' property should be determined in accordance with the succession

(1) I. L. R. 2 Bomb. 388.

(2) Ibid., p. 423.

to the property of a male, or whether it means nearest by relationship, the co-widow has the first right of succession, but in the latter case concurrently with other kinsmen in the same degree. But, they say: "The identity of the wife with her husband being accepted as a leading principle of the Mitakshara, the rule seems, on the whole, most consonant to it whereby precedence in heritable relation to him gives a like precedence and order of succession in relation to his widow."

And they add: "Such appears to be the rule, too, which custom has preferred in this part of India."

In accordance with these views it has been recently decided in a case from the Satara district, where the Mitakshara is the governing authority, that a co-widow succeeds to a childless widow's stridhan in preference to her husband's brother's son: *Krishnabai Martand v. Shripati Pandu*. (1)

The grounds upon which it is said that the rule thus deducible from the Mitakshara is altered or superseded by the Mayukha are to be found in c. iv., s. 10, of that treatise, placita 28 and 30 (Stokes, p. 105), which are as follows:—

"‘28. The property of a childless woman married in the form denominated Brahma, or in any of the other four [unblamed modes of marriage] goes to her husband; but if she leave progeny, it will go to her daughters; and in other forms of marriage [as the asura, &c.] it goes to her father and mother on failure of her own issue.’ [In the one case] if there be no husband, then the nearest to her, in his [tat] own family takes it; and [in the other case], if her father do not exist, the nearest to her in [her] father’s family succeeds, [for the law that:] ‘To the nearest sapinda, the inheritance next belongs,’ as declared by Manu, denotes that the right of inheriting her wealth is derived even from nearness of kin to the deceased [female] under discussion—and, though the Mitakshara holds, ‘that on failure of the husband, it goes to his [tat] nearest kinsmen [sapinda] allied by funeral oblations’; and ‘on failure of the father then to his [tat] nearest sapindas’; yet, from the context it may be demonstrated that her nearest relations are his nearest relations; and [the pronoun *tat* being used in the common gender] it allows

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of our expounding the passage 'those nearest to him, through her in his own family': for the expressions are of similar import."

"30. On failure of the husband of a deceased woman, if married according to the Brahma or other [four] forms; or of her parents, if married according to the asura or other two forms, the heirs to the woman's property, as expounded above, are thus pointed out by Brihaspati: 'The mother's sister; the maternal uncle's wife; the paternal uncle's wife; the father's sister; the mother-in-law, and the wife of an elder brother, are pronounced similar to mothers. If they leave no son born in lawful wedlock, nor daughter's son, nor his son, then the sister's son, and the rest shall take their property.' Here must be understood, 'on failure both of the daughter, and also of her daughter,' because only on failure of them does the right of inheritance pertain to the son born in wedlock, or to the daughter's son."

The text of Brihaspati, quoted above, is thus paraphrased by Banerjee J. in his Tagore Lectures (1878, 2nd ed. pp. 387 and 388): "To a male the females related as the sister of his mother, the wife of his maternal or of his paternal uncle, the sister of his father, the mother of his wife, and the wife of his elder brother are like his mother; and so to a female the males related in the reciprocal way as her sister's son, her husband's sister's son, her husband's brother's son, her brother's son, her daughter's husband, and her husband's younger brother are like her son. And these last-mentioned relations of a female being like her sons inherit her stridhana if she leave no male issue, nor son of a daughter, nor a daughter."

You have, therefore, the following list of relations to the childless widow and deceased proprietress of the stridhan who are said to be like her sons, and have been called by some text writers secondary sons: (1.) Sister's son; (2.) Husband's sister's son; (3.) Husband's brother's son; (4.) Brother's son; (5.) Son-in-law, or daughter's husband; (6.) Husband's younger brother.

The chief difficulty about the text of Brihaspati is that we do not know the context in which it occurs. It appears to give promiscuously the sapindas of the husband and those of the

father without noticing the distinction in the devolution of the property depending upon the form of marriage of the deceased widow. No intelligible principle has been discovered for the order in which they are enumerated. It is at variance with the settled and universally recognised principles of the Hindu law of inheritance, and the enumeration is obviously not exhaustive. Moreover, it is so expressed as to bring in the secondary sons immediately after the issue of the widow, for the words "if they leave no son," &c., are construed to refer to childless widows, and the description of the issue, upon failure of whom Brihaspati's secondary sons are to take, is neither exhaustive nor accurately descriptive of the order in which such issue would be entitled to succeed. The important question, however, is, how the author of the Mayukha understood the quotation. In his comment at the end of pl. 30 he partially supplies the gaps left in the enumeration of issue, but not fully. If the "son born in lawful wedlock" means or includes a son of a rival wife (as is said in the *Daya Bhaga*), he would take only after the husband and (if the order of succession be based on propinquity) concurrently with the rival wife: see West and Bühler, *Digest*, p. 518, already quoted.

Nikalantha, however, clearly intends to bring in Brihaspati's series of secondary sons on failure of the husband or father, but whether immediately on that event or in what order is another question. Three constructions have been offered on these points. First, it was argued before their Lordships that the words "on failure of the husband of a deceased woman" should be read as meaning "on failure of the husband and his line of sapindas," succeeding in accordance with pl. 28. Secondly, that Brihaspati's series of secondary sons comes in between the husband and his nearest sapindas and in the order in which they are mentioned. Thirdly, that a distributive construction should be given to Brihaspati's text applying the husband's relatives named to the case of a woman married in one of the approved forms, and the father's relatives to the other case only, and the text should be read as illustrative only, and neither exhaustive nor intended to prescribe the order in which the enumerated heirs take.

It does not appear to their Lordships possible to adopt the first

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of these constructions without doing unnecessary violence to the language and context. The words in pl. 80 are: "On failure of the husband the heirs to the woman's property as expounded above are thus pointed out by Brihaspati." The quotation from Brihaspati, therefore, was intended to be used in the Mayukha as explanatory or expository of the class of heirs already pointed out in pl. 28, and not as substitutive for them or as superseding them. Again, some of the husband's sapindas are included in Brihaspati's series, which seems decisive against this construction.

What may be described as a modified form of this construction is that adopted by Batty J. That learned judge held that the point of bifurcation where the Mitakshara and Mayukha separate appears to be a point below the widow in the series of successive heirs, and that it is the recognized identity of the wife with her husband that entitles a co-widow's children and a co-widow herself to take precedence as sapindas to the wife herself or as representing the husband himself before resort is had to the husband's sapindas at all. The Chief Justice says that he is aware of no passage in the Mayukha that can be taken as a warrant for the identification of the wife with her husband. It seems, however, difficult to maintain this position in face of the learned judgments of Sir Michael Westropp and West J. in the case of *Lallubhai Bapubhai v. Mankuarbaiv*, and the judgment of Telang J. in *Gojabai v. Shrimant Shahajirao Maloji Raje Bhosle*. (1)

According to the second construction the text of Brihaspati is read in what is no doubt its more obvious and literal sense apart from the context. It is that adopted by the Chief Justice and supported by the respondents in the present appeal, and it has considerable authority in its favour, including the Daya Bhaga, the Viramitrodaya, and Vyavastha Chandrika, and, amongst modern text writers, West and Bühler, Banerjee J., and Mr. G. Sarkar. In the Daya Bhaga, however, it is said that if the order of succession were according to Brihaspati's text it would be contrary to the opinion and practice of venerable persons, and that the text is propounded "not as declaratory of the order of inheritance but of the strength of the fact," whatever

(1) I. L. R. 2 Bomb. 388; S. C. in appeal L. R. 7 Ind. Ap. 212, 231.

those words may mean. Notwithstanding the weight of the authority in its favour, their Lordships cannot bring themselves to think that the construction contended for by the respondents is the one which they ought to adopt. So far from construing the Mitakshara and the Mayukha so as to harmonize with one another so far as that is reasonably possible, the respondents place them in direct conflict, and not only so, but the Mayukha is also divided against itself. Placitum 30 deals as well with the case of a widow married in one of the approved forms as with that of a widow married in one of the lower forms, and is expressed to be expository of the rule laid down in pl. 28. But some of the enumerated heirs are not blood relations of the husband at all, or members of his family, and others of them are not blood relations of the widow's father, or members of his family. Again, those who are nearest (both as regards degree of propinquity and in order of inheritance) are postponed in favour of those who are more remote in contradiction alike of the Mitakshara and pl. 28 of the Mayukha.

The case of *Gojabai v. Shrimant Shahajirao Maloji Raje Bhosle* (1) related to the succession to the stridhan of a childless Hindu widow married in one of the approved forms, who left her surviving (1.) a co-widow, (2.) the grandson of another co-widow, (3.) a son of her husband's brother. The case fell to be decided in accordance with the Mitakshara, and the decision was in favour of the step-grandson, whether he was to be described as the husband's nearest sapinda or the wife's nearest sapinda in his family. But the texts of the Mayukha now under consideration had been relied on in argument, and the judgment of Telang J. contains a valuable disquisition on that commentary. "Construing the Mitakshara in the sense which Nilakantha places upon its language" (pl. 28), the learned judge says: "The wife having by her marriage been 'born again in the husband's family,' and having become 'half the body of the husband' the sapindas of the husband necessarily become her sapindas, and their degrees of propinquity to the husband and wife must be held to be identical unless some specific reason to the contrary is shewn."

The judgment of the learned judge also contains the following

(1) I. L. R. 17 Bomb. 114.

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passages: "In truth even the rule which Nilakantha himself deduces from Yajnavalkya's general text is not in harmony with the enumeration of heirs contained in the text of Brihaspati now under consideration. And yet the Mayukha does not say how the two are to be made to stand together. The learned authors of the Digest have placed the heirs enumerated by Brihaspati after the husband and before the woman's sapindas in her husband's family. This certainly appears to be warranted by the express words of the Mayukha contained in placitum 30. Yet it is not quite reconcileable with the previous declaration in placitum 28 that 'if there be no husband then the nearest to her in his family takes' the woman's property. It is quite plain that some of the persons referred to in Brihaspati's text do not answer to this description at all, while of those that do the husband's brother's son is not obviously nearer than the husband's younger brother, and yet according to Brihaspati's text the former would stand before the latter. It cannot therefore be assumed to be quite clear according to the view of the Mayukha that Brihaspati's list states the true order of succession as between the heirs enumerated or that all those heirs take precedence over the ones included under the designation 'nearest to her in her husband's family.'"

And again: "But Mr. Bhandarkar argued that the heirs specifically named in Brihaspati's text ought to be given precedence over those who come in under the general designation, each group of them taking precedence in the class (viz., that of husband's kinsmen or parent's kinsmen) to which it belonged. There is, however, no authority for this view. In West and Bühler's Digest the precedence is given to the whole of the enumerated heirs, and the ground for such precedence has already been stated. If they are not treated as one class there is apparently no other ground for the preference than is indicated by the principle mentioned in the Vyavahara Mayukha, c. iv., s. 8, pl. 18. But that principle, as there expressed, appears to be intended to apply only where there is a 'compact series.' This Court in *Mohandas v. Krishnabai* (1) declined to apply it in the case of bandhus so as to give to the bandhus expressly named a preference over

(1) I. L. R. 3 Bomb. 597.

those who come in under the general definition. I think this is the authority which would be more applicable in the matter before us, and no such preference of the designated persons can therefore be allowed in this case."

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The case of *Bachha Jha v. Jugmon Jha* (1), on the other hand, was a judicial decision on the text of Brihaspati now under consideration. It was there held that the stridhan property of a widow governed by the Mithila law and married in one of the approved forms, goes to her husband's brother's son in preference to her sister's son. It appears from the judgment of the Court that the vakil for the appellant had relied on that portion of Ratnakara which treats of stridhan. The learned judges observe that that book is no doubt one of considerable authority in the Mithila school, and if the matter were clear upon what Ratnakara says on the subject, they should, perhaps, have no difficulty in deciding the matter. The author of Ratnakara (it appears) in the passage relied on cited the text of Brihaspati now under consideration, with the following commentary, viz., "The meaning is that in default of the son and the rest, the sister's son, &c., shall take the property of their mother's sister and others." The learned judges refer to other commentaries in which the same text of Brihaspati is cited, and they quote an opinion attributed to Mr. Colebrooke, in which it is stated that by some commentators a distributive construction of the text is adopted, the three relations in Brihaspati's enumerated heirs who are so through the husband taking the property in the one case, and the three who are so through the father taking the property in the other case. And after discussing the placita in the Mayukha dealing with the subject they say they are inclined to think that what the author meant to lay down was that the succession of the heirs mentioned in Brihaspati's text is to be taken to be subject to the rule of law laid down by him in accordance with the Mitakshara, as suggested in "Shama Churn's Vyavastha Chandrika," vol. ii., p. 539. Ultimately, the case was decided in accordance with the Mitakshara, on the ground that the meaning and effect of the text of Brihaspati quoted by Ratnakara was too ambiguous to control the plain meaning of that work.

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The Chief Justice answers the argument that some of the persons enumerated in Brihaspati's text as heirs do not answer the description of being the nearest in the husband's family by saying that this criticism loses sight of the fiction on which the text is based, which, he says, involves the consequence that the persons enumerated are equal to sons. With great respect, this is not what is said, or apparently intended, by the text. They do not take concurrently with sons, and no text-writer has even suggested that they take concurrently with each other, as they would do if they were all equal to sons, or to be treated as sons. The analogy appears to their Lordships to be purely fanciful and not based on any discoverable principle. Nor is it in accordance with the fact. The kinship of the husband's brother's son is not derived through the wife of the husband's brother, but through the husband's brother himself.

It is apparent from the judgments above quoted that the learned judges did not treat the application of Brihaspati's text, or the meaning of the author of the Mayukha in quoting it, as settled by authority, either as regards the place in the succession of the enumerated heirs or the order in which they are to take. It would perhaps be sufficient for their Lordships to say, in accordance with a well settled principle of construction, that the unambiguous direction in pl. 28 of the Mayukha is not controlled by a subsequent text, the language of which is of such uncertain meaning as that contained in pl. 30 of the same work. But following out the line of thought suggested in the judgments quoted above, their Lordships think that a construction may be put on the language of pl. 30 of the Mayukha, which will bring it into harmony with the Mitakshara, and also reconcile it with the previous placitum of the Mayukha itself. They are of opinion that the text of Brihaspati should be read distributively as regards the property of women married according to one of the approved forms, and the property of those married in one of the lower forms. In the one case, those of the heirs enumerated by Brihaspati who are blood relations of the husband, viz., the husband's sister's son, and the husband's brothers' son, and the husband's brother, will succeed to the woman's property, and in the other case the relations of the father will

succeed. In the diversity of opinion amongst the text-writers whether Brihaspati's series of heirs take in the order in which they are enumerated, their Lordships think that the better opinion is that the order of succession is not indicated. There is no apparent reason for preferring the husband's sister's son to the husband's brother's son, or both, to the husband's brother. And their Lordships agree with the learned editor of the Vyavastha Chandrika that the solution is to be found by reference to pl. 28, in which the heirs are described as the nearest sapindas of the wife in the husband's family, or the nearest to her in her father's family, as the case may be. The list is not exhaustive, and neither a co-widow, nor any other sapinda of the husband, is excluded. The words "and the rest" therefore must mean, or include, the other relations of the husband or father. But if the text does not prescribe any new order of succession, and the co-widow is not excluded, it follows that she must take in her right place, or (in other words) the appellant is entitled in preference to the respondents. Their Lordships thus arrive at the same conclusion as Batty J., though by a somewhat different road.

If there were any construction of the text laid down by authority binding on the Courts of Bombay, or if there were any established practice or usage in the application of the text, their Lordships would follow it without hesitation, though it might not commend itself to their judgment. But no such authority has been referred to, and there is no evidence of any such practice or usage. Their Lordships therefore are at liberty, and are bound, to act on the opinion which they have formed, and will humbly advise His Majesty that the appeal be allowed, and that the order of the High Court of Bombay (appeal side), dated December 11, 1908, be discharged, and the decree of Batty J., dated February 21, 1908, be restored, and that the respondents do pay to the appellant the costs of their appeal in the High Court. They will also pay the costs of this appeal.

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Solicitors for appellant: *Ashurst, Morris, Crisp & Co.*

Solicitors for Hunsraj Morarji: *Payne & Latt ey.*

Solicitors for Bai Monghibai: *Rawle, Johnstone & Co.*

J. C.* CHANDRASANGJI HIMATSANGJI DEFENDANT.

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AND

May 3, 4, 8; MOHANSANGJI HAMIRSANGJI PLAINTIFF.
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ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Action in Ejectment—Issue as to alleged Personation by Plaintiff—Admissibility and effect of ex parte Official Inquiries.

In an action brought in 1894 by the presumptive collateral heir to a deceased Hindu to recover his estate from the appellant as having been substituted for the real heir, who was admittedly born in 1881, but was alleged by the plaintiff to have died in 1883, it appeared that a former suit had been brought in 1885 by the then collateral heir against the appellant and others for a similar purpose after his pleader had, in furtherance of a criminal charge of personation against the appellant's mother, instituted with the assistance of the authorities two secret and official inquiries with the object of either preventing or proving the crime charged.

The First Court dismissed the suit, the alleged substitution not having been proved; but the High Court considered that the plaintiff's case was supported by "overwhelming circumstantial evidence," meaning the proceedings at and the results of the said inquiries:—

Held, allowing the appeal, that having regard to the purpose, the nature and the circumstances of the said inquiries, which were not in any sense judicial, but were made ex parte in order to obtain support to a foregone conclusion, the said proceedings and results were not, even if admissible, entitled to any weight.

APPEAL from a decree of the High Court (March 7, 1899), reversing a decree of the Assistant Judge at Broach (November 10, 1897).

The question decided was one of fact, about which the two Courts below differed. It was whether the Chandrasangji, who was the admittedly legitimate son of Himatsangji, the Thakor of Matar, and Bai Jitba his wife, born at Jadsal, in the native State of Rajpipla on October 31, 1881, died at Majrol, in the Gaikwar's territories, on May 14, 1883; and, if he did so die, whether the above-named appellant Chandrasangji Himatsangji was really Jiku, a son of Bai Jitba's brother Parbhat Bapu, and was substituted by Bai Jitba for her dead son.

* *Present*: LORD MACNAGHTEN, SIR ANDREW SCOBLE, SIR ARTHUR WILSON, and SIR ALFRED WILLS.

Parikh and *Doherty*, for the appellant, contended that there was no sufficient evidence to prove the death, as alleged, of the admitted heir, or of his being personated by the appellant. The High Court had overruled the decision of the First Court entirely on the ground of statements contained in certain documents, and resulting from certain official inquiries made some years previously which were *ex parte* and in no sense judicial. These were improperly admitted in evidence: see s. 35 of the Indian Evidence Act. Reference was made to *Rajah Leelanund Singh v. Lakhputtee Thakorain* (1); *Samar Dasadh v. Juggulkishore Singh* (2); *Satischunder Mukhopadhyaya v. Mohendrolal Pathuk* (3); *Ponnammal v. Sundaram Pillai* (4); *Zemindar of Ramnad v. Perianayagam* (5); *Rani Lekraj Kuar v. Mahpal Singh*. (6)

The respondent did not appear.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal from a judgment and decree of the High Court of Bombay, dated March 7, 1899, which reversed a decree of the Assistant Judge of Broach of November 10, 1897. The question raised is one of fact, whether the appellant Chandrasang, the principal defendant in the suit, is entitled to the name he bears, and to the estates which prior to the suit he had long enjoyed, as the son and heir of Himatsang, or whether, as maintained by the plaintiff in the suit, now the respondent, the real Chandrasang died in infancy and the appellant was fraudulently substituted in his place. The First Court held the appellant to be the genuine Chandrasang; the High Court thought otherwise.

Himatsang, who died on January 20, 1882, was the Thakor of Matar, and as such was possessed of estates in the district of Broach and in Baroda territory, which by custom descended to a single male heir in accordance with the rule of primogeniture. He left surviving him four widows, of whom the first three were childless, while the fourth, Jitba, had an infant son, Chandrasang, born on October 31, 1881, a few months before his father's death;

(1) (1874) 22 Suth. W. R. 231.

(2) (1895) I. L. R. 23 Calc. 366.

(3) (1890) I. L. R. 17 Calc. 849.

(4) (1900) I. L. R. 23 Madr. 499.

(5) (1874) L. R. 1 Ind. Ap. 209.

(6) (1879) L. R. 7 Ind. Ap. 63.

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and there is no question that this son was his father's lawful heir. Himatsang also left surviving him collateral agnates in two lines. The elder line was represented by Parbhatsang, who would have been the nearest heir of Himatsang if the infant had been out of the way. He died in July, 1888, and his rights, if any, passed to his grandson Chhatrasang, who in turn died in 1885; and with him the elder line of collaterals became extinct, and its rights, if any, passed to the second line. The second collateral line was represented at first by Hamirsang, and after his death in 1894 by his son Mohansang, the plaintiff in this suit and respondent in the present appeal.

Upon the death of Himatsang the title of his infant son Chandrasang was at first not disputed; the conflict was as to the administration of his estate. But as soon as that controversy was settled, Parbhatsang claimed the estates as his own, on the allegation that Himatsang had really died childless, and that Chandrasang was a child, of other parentage, fraudulently put forward as the child of Jitba and as the heir of her husband.

From that time—that is to say, from March, 1882, down to June, 1884—this story was the only basis of the claims put forward. It is now clear, indeed it is the case of both sides, that that story was untrue. Its only present importance is in its bearing upon the good faith or bad faith, the probability or improbability, and thus upon the truth or falsehood of another case, based upon events said to have happened at a later period. It is therefore unnecessary to examine the earlier proceedings in detail; but three points may be usefully noted: First, the early claim was by the elder collateral branch; the four widows supported the rights of the infant, and the then representative of the junior collateral branch sided with them. Secondly, the Collector of Broach was in possession of the estates as guardian of the property of the infant, duly appointed by an order of Court. Thirdly, though in July, 1882, criminal proceedings were instituted before the Political Agent Rewakantha, they were withdrawn; and no suit was ever brought to enforce the claim on the ground now referred to adversely to the infant. That state of things continued down to May, 1884, two years and a quarter after the death of Himatsang.

The second ground of claim to the property, which is the ground now in question, arises out of events alleged to have occurred on and immediately after May 14, 1883, on which day, it had been alleged, on behalf of the successive claimants, that the boy Chandrasang died, and that another boy, by name Jiku, a son of Jitba's brother, and a boy considerably older than Chandrasang, was fraudulently substituted in place of the deceased. This story was not told in place of the former complaint that Chandrasang himself was a spurious child, for that story was still maintained for some time by the successive claimants, though it is now abandoned. The story of the alleged death and substitution on May 14, 1883, was in addition to this story.

In 1884 Parbhatsang, the original head of the senior collateral line, was dead, and his grandson Chhatrasang had succeeded to his place. In the middle of May, 1884, he entered into an arrangement with one Kurnaram, a pleader of the District Court of Broach, in pursuance of which the latter at once took active steps to further the interests of his employer.

On May 30, 1884, Kurnaram made an application for assistance to the Collector of Broach. He asserted the death of Chandrasang, and alleged the intention to substitute another boy in his place. In accordance with that application the Collector took steps which led to certain investigations and inquiries, the result of which has had an important bearing upon the decision of the case by the High Court. But as these matters will have to be considered in some detail at a later stage it is unnecessary to examine them at this point.

On September 8, 1884, Chhatrasang made a complaint to the first-class magistrate at Broach against Jitba on a charge of cheating by personation, the charge being based upon the alleged death of Chandrasang and substitution of Jiku. The magistrate took depositions on oath, and considered the matter once and again. His conclusion was that the story was untrue, and that there was no reasonable ground for a criminal prosecution, and accordingly on June 10, 1885 he finally dismissed the complaint under s. 203 of the Criminal Procedure Code. That order was confirmed by the District Magistrate, and the

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J. C. High Court on November 25, 1885, refused to interfere by way of revision.

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While the criminal proceedings just mentioned were pending, on April 16, 1885, Chhatrasang brought a civil suit against Chandrasang and others, in which he alleged the death of the real Chandrasang and the substitution of Jiku into his place and name, and asked for declarations of the spuriousness of the so-called Chandrasang, and of the validity of his own title as heir. Various delays occurred. Chhatrasang died leaving no male issue, and his rights, if any, passed to Hamirsang, the head of the junior collateral line, and the latter was substituted as plaintiff. The Collector of Broach had to be added as a party, and the plaint had to be returned in order that it might be presented in another Court. That suit was never tried on the merits. It came on before the Assistant Judge of Broach on March 26, 1888, for the disposal of certain issues of law, and was dismissed for want of a proper stamp. The Assistant Judge said: "As the plaintiff still persists in declaring that his suit is one for a mere declaration, and that it is properly stamped with a stamp of Rs.10, the only course open to me is to dismiss the suit with costs." Against this decision there seems to have been no appeal.

From August, 1893, till near the end of 1894, negotiations were in progress for a compromise between the parties interested, but nothing came of them. It may be noted, however, that during the progress of those negotiations the appellant was married, and the principal ceremony on the occasion was performed by Hamirsang, whose son the respondent is, and through whom he claims.

On December 12, 1894, the present suit was instituted by the respondent against Jitba, the alleged mother, and the appellant her reputed son, and others, including the Collector of Broach as administrator of the Matar estates. Its material allegations were that Jitba gave birth to Chandrasang on October 31, 1881, that Chandrasang died in his infancy in June, 1883, in the village of Majrol, in Baroda territory, and that Jitba, with the aid of others, concealed the death of Chandrasang, and in his place kept with her her brother's

son, whose real name was Jiku, giving him the false name of Chandrasang. The plaintiff asked for a declaration that the appellant was not the son and heir of Himatsang, and a declaration that the plaintiff, now respondent, was entitled to the properties in Broach, and that the Collector should deliver him possession. The allegations just quoted were denied, and thus was raised the sole issue now of any importance.

At the trial before the Assistant Judge the story told was that, on May 14, 1888, Chandrasang was removed by his mother, accompanied or followed by certain persons named, in a cart from Matar to Majrol in Baroda. (That mother and child left Matar is admitted, but it is said for' Chhaliar.) It is asserted that on the road the child became dangerously ill, that he died at Majrol the same evening, that his body was at once sent for burial, and that the now appellant, said to be Jiku, was sent for and arrived on May 16, and from thenceforth was held out as the genuine Chandrasang. The genuine child was at that time aged two and a half; Jiku, it was said, was at the same time some six or seven years old.

The direct evidence in support of the case so stated was that of three witnesses, as to each of whom the judge at trial recorded that his evidence was unsatisfactory and untrustworthy, and he totally disbelieved them. He also disbelieved the subsidiary story of an alleged attempt made almost at the same time to obtain another child, presumably less unsuitable in age.

The Assistant Judge dismissed the suit with costs. The High Court, upon appeal, reversed that decision and gave a decree in favour of the plaintiff, the now respondent, but without costs, and against that decision the present appeal has been brought.

The story told is in itself one difficult to accept. The attempt to substitute a boy of Jiku's age for a child of two and a half years would be an extraordinarily daring one, the more so because no attempt appears to have been made to keep the boy in seclusion, or screen him from general observation.

The fact that the judge, who heard and saw the witnesses, and whose very full judgment shews the great care and attention which he devoted to the case, disbelieved the witnesses is entitled to the utmost weight.

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Again, it is impossible to approach the story now told without a certain suspicion, arising from the attack so long maintained upon the real parentage of the Chandrasang now admitted to be the genuine child of Himatsang. And this suspicion is necessarily increased by the inconsistent and shifty conduct of the now respondent and his immediate predecessor in title.

The extraordinary length of time which was allowed to elapse after May 14, 1883, the date upon which everything turns, and December 12, 1894, when the present suit was filed, is also a circumstance very adverse to the respondent. During all that interval, with the exception of a part of 1893 and 1894, when negotiations for a compromise were in progress, there was never a time at which proper steps might not, and ought not, to have been taken to secure a full trial of the question in issue; and that question is one which from its nature specially required to be disposed of while the facts were fresh. When a suit was brought in 1885 it was never pressed to a trial, but allowed to terminate for want of proper stamp duty. The whole course of proceedings from 1883 to 1894 seems to their Lordships difficult to reconcile with a reasonable desire, on the part of the claimants, to have the question of fact investigated before the proper tribunal, and with proper promptitude.

In his judgment upon the appeal to the High Court Candy J. said: "The question is whether the Majrol story is proved. It stood the test of the cross-examination of the witnesses in the witness-box, but after this lapse of time much more than that is necessary before the Court can eject the second defendant from the estate. The story must be supported by overwhelming circumstantial evidence." That support, the learned judges thought, was supplied by the result of the inquiries made in June, 1884, by two officials, the Thanedar of Panpu in Rewakantha and the Mamlatdar of Amod in Broach. Those inquiries have been briefly referred to in an earlier part of this judgment, but, inasmuch as they formed the substantial ground upon which the High Court overruled the judgment of the First Court, they call for further consideration.

On May 30, 1884, Kurnaram, the pleader acting on behalf of Chhatrasang, applied to the District Magistrate of Broach for

assistance, and accordingly the magistrate wrote a letter to the Political Agent Rewakantha, which he entrusted to Kurnaram. The terms of that letter explain the circumstances. It ran :

“ Mr. Kurnaram Durgaram Vakil, the bearer, has just informed me that the heir of the Matar Thakore died about nine months ago, and that there is now at Chhaliyar, in the Darbar, a boy whom they intend to substitute for the dead boy.

“ Mr. Kurnaram acts for the presumptive heir of the Thakore. He says that if inquiries are at once made at Chhaliyar the fraud will be detected, because the deceased Chandrasang was born at Kartik Sud, 9th of 1938, that is about two and a half years ago, whilst the young pretender is about eight years old. Also that the latter's parents are living in Nandod.

“ For the present I do not wish to make the matter public by searching for details in my office. But I shall be much obliged if you will have the goodness to make inquiries at your earliest convenience, so that it may be fixed what boy is asserted to be heir and what is his age, otherwise a boy of the proper age might be found. Mr. Kurnaram is furnished with full particulars. I request that you will favour me with the result of your inquiries.”

This letter was taken by Kurnaram to the Political Agent, who on its receipt gave instruction to the Thanedar of Pandu, Parbhuram by name, to take with him Kurnaram and make the desired inquiries in his presence, and to report.

Parbhuram and Kurnaram went together to Chhaliar. There they are said to have taken a statement from the boy himself, statements from three other persons, a schoolmaster, a chobdar, and a kharbhari, and to have, with the assistance of others, formed the opinion that the boy was about seven years old, and to have caused him to be measured, with the result that his height was found to be three feet six inches.

Parbhuram made his report to the Political Agent, enclosing the statements said to have been made in his presence, and a punchnama said to have been signed on behalf of the members of what was called a punch, which was composed in fact of two sowars in attendance on Parbhuram. Kurnaram was dead before the trial. The evidence of Parbhuram was taken on commission. The schoolmaster was a witness at the trial.

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The chobdar and the kharbhari were not called, nor were the two sowars.

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The inquiries at Chhaliar went no further, the boy being removed by his mother to Matar. Thereupon the District Magistrate gave another letter to Kurnaram addressed to the Mamlatdar of Amod, in the district of Broach, in which he appears to have instructed the Mamlatdar "to make the inquiries Mr. Kurnaram may suggest as secretly and rapidly as possible and allow the Darbar people no time to commit a fraud in regard to a boy whom the vakil asserts the Darbar have attempted to substitute for the real Thakore, who it is alleged died some months ago."

In accordance with that order the Mamlatdar, accompanied by Kurnaram, proceeded to make inquiries. He is said to have taken a statement from Jitba, the boy's alleged mother, and at Kurnaram's suggestion to have caused a measurement to be taken with a tape measure of the boy's height while he was lying on a cot, and that height was said to be found to be three feet five and a half inches.

When the case was before the High Court, and again on the argument of the appeal before their Lordships, objection was taken to the admissibility in evidence of much of the materials relating to the two inquiries just mentioned, and as to some of them at least it would apparently be very difficult to support their admissibility if it were necessary to decide the point. But the whole evidence seems to have been admitted without objection in the First Court, and their Lordships would have regretted if they had been obliged to dispose of the present appeal upon a question of legal admissibility, and the more so as the appeal has been heard *ex parte*. Their Lordships are not under any such necessity, because they think that, assuming the evidence to be admissible, it is of little, if any, value. This appears to them to follow from the purpose, the nature, and the circumstances of the inquiries.

The District Magistrate received information from Kurnaram which he apparently believed, and which, if true, shewed that a grave crime was being, or was about to be, committed, which, if successful, would result in a great wrong with respect to

properties in his district; and their Lordships do not doubt that that officer acted rightly in taking such steps as seemed to him necessary, in the emergency, for the prevention of the crime. But it must be observed that those inquiries, if they can be called official in any sense, were certainly not judicial. The effect of the orders was to place the services of the officials employed at the disposal of Kurnaram, the pleader of the complainant, in order to enable that gentleman to obtain material in support of a foregone conclusion. The inquiries were secret; no notice was given to anybody on behalf of the boy. Nobody was present throughout the inquiries to represent the boy or protect his interests. There was nobody to check the mode in which the alleged statements were elicited, whether by leading questions or otherwise, nobody to test the statements by cross-examination, nobody to watch the accuracy with which they were recorded.

Upon these broad considerations, and without examining in detail the various inconsistencies and defects in the records and in the evidence relating to the inquiries, their Lordships are of opinion that practically no weight can properly be given to the proceedings at, or the results of, those inquiries.

As to the alleged statement by the boy himself, assuming it to be correctly reported, there is nothing to shew whether the language is in any part his own, or whether it was put in his mouth by the person conducting the examination; and nothing could be easier than to extract by the latter process almost any statement from a frightened child, who suddenly finds himself alone in the custody of strangers, and some of them officials.

The alleged deposition of Jitba, so far as it was relied upon, refers to matters of which she could have no personal knowledge.

The evidence as to the apparent age of the boy, and as to the alleged measurement of his height, appears to their Lordships, on the grounds already stated, to be wholly untrustworthy. And in this they find themselves in agreement with both the magistrates who dealt with the criminal charge in 1884 and 1885 and with the judge who tried this case.

Their Lordships will humbly advise His Majesty that the

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J. C. decree of the High Court should be discharged and the suit
1906 dismissed with costs in both the Courts in India. The respondent
must pay the costs of this appeal.

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Solicitor for appellant: *E. Pagden.*

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ACTION IN EJECTMENT—*Issue as to alleged Personation by Plaintiff—Admissibility and effect of ex parte Official Inquiries.*

In an action brought in 1894 by the presumptive collateral heir to a deceased Hindu to recover his estate from the appellant as having been substituted for the real heir, who was admittedly born in 1881, but was alleged by the plaintiff to have died in 1883, it appeared that a former suit had been brought in 1885 by the then collateral heir against the appellant and others for a similar purpose after his pleader had, in furtherance of a criminal charge of personation against the appellant's mother, instituted with the assistance of the authorities two secret and official inquiries with the object of either preventing or proving the crime charged.

The First Court dismissed the suit, the alleged substitution not having been proved; but the High Court considered that the plaintiff's case was supported by "overwhelming circumstantial evidence," meaning the proceedings at and the results of the said inquiries:—

Held, allowing the appeal, that having regard to the purpose, the nature and the circumstances of the said inquiries, which were not in any sense judicial, but were made ex parte in order to obtain support to a foregone conclusion, the said proceedings and results were not, even if admissible, entitled to any weight. **CHANDRASANGJI HIMATSANGJI v. MOHANSANGJI HAMIRSANGJI** - - - - - 198

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BENGAL ACT VII. OF 1880, ss. 12, 16, 17, 24—Bengal Act IX. of 1880, s. 16—Sale in Execution of a Certificate—Certificate and Sale set aside by the Revenue Authorities—Suit by Purchaser—Jurisdiction—Limitation.

Where a sale was made under Bengal Act VII. of 1880 of the respondent's estate in execution of a certificate granted by a deputy collector in respect of a fine imposed on the respondent for non-compliance with a notice under s. 16 of the Cess Act (Bengal Act IX. of 1880), and the appellant was put in possession as purchaser, it appeared that the Board of Revenue subsequently to the sale decided that the fine was unjust and set aside the certificate, and that thereafter the Commissioner annulled the sale.

In a suit by the respondent against the appellant to set aside the sale and recover possession:—

Held—(1.) the Revenue authorities had jurisdiction to make the orders setting aside the certificate and annulling the sale, their power of supervision in that respect under Act VII. of 1880 (see ss. 17 and 24) being of the widest possible character;

(2.) The period of limitation prescribed by ss. 12 and 16 is inapplicable to the exercise of revisional jurisdiction;

(3.) The proper remedy for the purchaser, if aggrieved by the orders of the Revenue authorities having been made in his absence, was to apply for rehearing, and it was too late to apply for a remand on that ground. **LALITESWAR SINGH v. MOHUNT GANESH DAS** - - - 134

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CIVIL PROCEDURE CODE, s. 462.—*Compromise on behalf of a Minor in a Suit—Practice.*

Civil Procedure Code, s. 462, which prohibits a compromise on behalf of a minor by his guardian in a suit without the leave of the Court, is not complied with unless it is shewn that leave was formally given after the attention of the Court had been directly called by petition or otherwise to the fact that the minor was a party thereto. In the absence of evidence to that effect the compromise must be declared not binding on the minor, who should be remitted to his original rights. *MANOHAR LAL v. JADU NATH SINGH* - - - - - 128

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GOVERNMENT REVENUE PAYABLE BY PUTNIDAR.—*Bengal Regulation VIII. of 1819, s. 3, clause 3—Rent payable to the Landlord—Construction of Kabulyats.*

Where payment by the putnidar of the Government revenue is on the true construction of the kabulyats part of the consideration rendered by the putnidar for the enjoyment of the tenure, and there is no stipulation that it is to be dealt with in the same manner as rent:—

Held, that the Government revenue so payable by the putnidar was not rent payable to the landlord within the meaning of Putni Regulation VIII. of 1819, s. 3, clause 3, and was not recoverable as such by sale under the Regulation. *MAHARAJAH BAHADUR SIB JOTINDRA MOHUN TAGORE v. SHIMATI BIBI JARAO KUMARI* - - - - - 30

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HINDU LAW—Power to Adopt—Construction—Power to adopt Successive Sons.

Where a Hindu has granted to his widow a power to adopt and has placed no specific limitation thereto, and it is clear that he desired to be represented by a son after death in order to secure spiritual benefit to himself and to continue his line:—

Held, that the widow's authority to adopt is not exhausted by a first adoption, but that, on the death of the first adopted son, the adoption of a second is a valid exercise of the power. *KANNEPALLI SURYANARAYANA v. PUCHA VENKATA RAMANA* - - - - - 145

HINDU LAW OF ADOPTION—Husband's Authority to his Widow to Adopt—Rights and Duties of Widow.

All the schools of Hindu law recognise the right of the widow to adopt with her husband's authority, which may be given either orally or in writing, and when given must be strictly pursued. She cannot, however, be compelled to act upon it unless and until she chooses to do so, and in the absence of express direction to the contrary, there is no limit to the time within which she may exercise the power conferred upon her.

Case in which upon oral evidence, in reference to which the Courts below differed, their Lordships found that the authority to adopt was given and strictly pursued. *MUTSADDI LAL v. KUNDAN LAL* - - - - - 55

HINDU LAW OF INHERITANCE IN BOMBAY—*Stridhan—Mitakshara, c. ii., s. 11, verses 8, 9, and 11—Mayukha, c. iv., s. 10, verses 28 and 30*

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—continued.

—*Hindu Widow dying without Issue—Preferential Rights of Co-widow—Claims of Husband's Brother or his Son.*

Questions on the Hindu law of inheritance to property in the island of Bombay are to be determined in accordance with the Mitakshara, subject to any varying doctrine contained in the Mayukha, ascertained after construing both treatises so as to harmonise with one another wherever and so far as that is reasonably possible.

By the Mitakshara, c. ii., s. 11, verses 8, 9, and 11, a Hindu co-widow is entitled to succeed to the stridhan of a widow dying without issue in preference to her husband's brother or brother's son.

The Maykuha, c. iv., s. 10, verses 28 and 30, does not on its true construction alter or supersede the doctrine of the Mitakshara. By the former verse her heirs are described as her nearest sapindas in her husband's or her father's family according to the form of her marriage. The co-widow is not excluded, nor is any new order of succession prescribed. She takes, therefore, in the order prescribed by the Mitakshara. That unambiguous direction cannot be controlled by the uncertain language of verse 30. The true construction of that verse, bringing it into harmony with verse 28 and the Mitakshara, is that the relations of the husband or the father succeed according to the form of marriage; but the list of heirs is given promiscuously, and is not exhaustive, nor is there any indication of an intention to alter or supersede the order or succession previously prescribed. **BAI KESSERBAI v. HUNSEAJ MORARJI** - - - 176

HINDU WIDOW DYING WITHOUT ISSUE:
*See HINDU LAW OF INHERITANCE IN BOMBAY.***HINDU WILL IN FAVOUR OF ADOPTED SON**
—*Entry in Wajib-ul-arz—Persona designata—Gift dependent on validity of Adoption.*

Assuming that a clause in the wajib-ul-arz in suit recorded under Act XIX. of 1873 can be treated as a will by the Hindu who signed it in favour of his adopted son:—

Held, that from a consideration of the descriptive words used after the ceremony of adoption had been effected, it was not the intention to give to him as a persona designata, but as an adopted son capable of inheriting by virtue of his adoption, and that the gift was dependent on the validity of the adoption.

Whether an entry in a wajib-ul-arz can be treated as a will depends in every case on the circumstances in which the entry was made and the construction it receives from extrinsic evidence. **MUSAMMAT LALI v. MURLI DHAR** 97

HUSBAND'S AUTHORITY TO HIS WIDOW TO ADOPT: *See HINDU LAW OF ADOPTION.***ILLEGAL POSSESSION BY MORTGAGEE:** *See MORTGAGE BY CONDITIONAL SALE.***INDIAN CONTRACT ACT, s. 18:** *See OUDH LAND REVENUE ACT, 1876.***ISSUE AS TO ALLEGED PERSONATION BY PLAINTIFF:** *See ACTION IN EJECTMENT.***JURISDICTION OF HIGH COURT—***Clause 13 of Charter of 1865—Superintendence over Resident's Court at Aden—Order removing Suit—Act II. of 1864.*

Held, that under Act II. of 1864 (India) the Court of the Resident at Aden is subject to the superintendence of the High Court of Bombay, which, under clause 13 of its charter of 1865, has power to remove and try and determine as a Court of extraordinary original jurisdiction a suit concerning land in Aden brought in the Court of the Political Resident in that place. **MUNICIPAL OFFICER, ADEN v. HAJEE ISMAIL HAJEE ALLANA** - - - 38

JURISDICTION: *See BENGAL ACT, VII. of 1880, ss. 12, 16, 17, 24.***LANDS NOT LIABLE TO RESUMPTION:** *See SERVICE TENURES.***LIMITATION—***Suit for Possession—Defendant's apparent Adoption—Act XV. of 1877, s. 2, Sch. II., Art. 144.*

Where the respondent, who attained majority in June, 1906, sued in May, 1899, to recover the taluqa in suit as next heir under Act I. of 1869, s. 22, clause 6, and the defendant defended his position after the lapse of twelve years under an apparent adoption, which both Courts had held to be invalid:—

Held, that there was no acquisition of title by the defendant within the meaning of s. 2 of Act XV. of 1877; that the Limitation Act of 1871 did not apply; and that the suit was barred by art. 144 of the second schedule to the Act of 1877.

Jagadamba Chowdhurani v. Dakhina Mohun (1886) L. R. 13 Ind. Ap. 84, distinguished. **THAKUR TIRBHUWAN BAHADUR SINGH v. RAJA RAMESHAR BAKSH SINGH** - - - 156

2. — Act XV. of 1877, s. 19—Acknowledgment of Liability—Admission of open and current Accounts—Construction.

Objections having been filed to a debtor's application as an executor for probate of the will of his deceased creditor, the debtor replied in a written statement signed by himself before the statutory period had run out and containing these words: "For the last five years he had open and current accounts with the deceased. The alleged indebtedness does not affect his right to apply for probate":—

Held, in a suit to recover an admitted balance of account from the debtor, that this was a sufficient acknowledgment of his liability within the meaning of s. 19 of Act XV. of 1877. It was a clear admission of open and current accounts, that either party had a right to an account, and that whoever turned out to be debtor was bound to pay.

In re River Steamer Co., Mitchell's Claim (1871) L. R. 6 Ch. 822, to the effect that a conditional promise to pay, the condition being performed, is a binding acknowledgment of

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debt, approved and held applicable to the construction of the Indian Act. **MANIRAM v. SETH RUPCHAND** - - - - -

And see BENGAL ACT VII. of 1880, ss. 12, 16, 17, 24.

MAHOMEDAN LAW—Deed of Gift—Possession—Consideration.

By Mahomedan law the holder of property may alienate it by deed of gift, accompanied by delivery of the thing given, so far as it is capable of delivery; or by deed of gift coupled with consideration, in which case, although delivery of possession is unnecessary, yet actual payment of the consideration must be proved, and also a bona fide intention on the part of the donor to divest himself in present of the property and to confer it on the donee.

In a suit to set aside a registered deed of gift purporting to be for consideration:—

Held, that on the evidence, it was proved that no consideration passed or was intended to pass; that the plaintiff did not intend to give the property to the defendant (except subject to a reservation expressed in the deed); that the deed was not followed by delivery of possession; and, consequently, that the deed was fictitious and void. **CHANDHRI MEHDI HASAN v. MUHAMMED HASAN** - - - - - 68

MANAGEMENT OF HINDU TEMPLE—Turns of Management—Family Arrangement—Scheme proved by unbroken Usage for Nineteen Years.

The office of manager of a Hindu temple was vested by inheritance in eight male descendants of the last holder by his two wives, four by each. One member of each branch held office for one year in alternate succession till 1881—2, when the four members of the junior branch, including the appellant, relinquished their claim in favour of the respondent, a member of the senior branch.

In a suit by the respondent against the appellant in effect to assert his term of office under this family arrangement:—

Held, that an unbroken usage for nineteen years was, as against the appellant, conclusive evidence thereof. The parties were competent to make it, for it involved no breach of trust; and it must hold good until altered by the Court or superseded by a new arrangement. **RAMANATHAN CHETTI v. MURUGAPPA CHETTI** - - - - - 139

MAYUKHA, c. IV., s. 10, verses 28 and 30: See HINDU LAW OF INHERITANCE IN BOMBAY.**MITAKSHARA, c. ii., s. 11, verses 8, 9 and 11: See HINDU LAW OF INHERITANCE, BOMBAY.****MORTGAGE—Construction—Usufructuary Clause controlled by the Context.**

Where the prima facie meaning of one clause in a mortgage deed was that the mortgagee entering into possession accepts the profits in lieu of interest:—

Held, in a suit for redemption, that by the true construction of this clause it was qualified by other clauses which should be read in con-

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junction therewith and not rejected for inconsistency, and that the mortgagor was liable to make good the deficiency of profits, with compound interest on the amount thereof. **JAWAHIR SINGH v. SOMESHAH DATT** - - - - - 42

MORTGAGE BY CONDITIONAL SALE—Construction—Regulation XVII. of 1806—Effectment by Mortgagor—Illegal Possession by Mortgagee—Effect of entry in Wajib-ul-arz as to Custom.

On September 28, 1866, a Mahomedan, since deceased, executed a deed of mortgage for Rs. 2000, repayable without interest in five years, hypothecating the two villages in suit as security.

On May 11, 1871, he executed a second deed in favour of the mortgagee, reciting the former one, the approaching expiration of the period of five years without repayment, and an agreement to extend the period by a further thirty years upon terms that if the mortgagor should die within the fixed period then "after me the whole share of zamindari, . . . hypothecated as above shall be considered as a complete sale" to the mortgagee, who, on becoming entitled to and possessed of the property, should be bound to make provision thereout for the maintenance of certain male members of the mortgagor's family.

In a suit by the plaintiffs, as widow and daughter of the mortgagor, to eject the appellant claiming under the mortgagee, who had on the death of the mortgagor obtained possession and mutation of names as absolute purchaser:—

Held—(1.) That on the evidence the plaintiffs were widow and daughter as alleged;

(2.) That an entry in a wajib-ul-arz was insufficient by itself to establish a custom to exclude them from inheritance;

(3.) That, on the true construction of the mortgage and Regulation XVII. of 1806, the property did not on the death of the mortgagor vest in the mortgagee as absolute purchaser;

(4.) That he took possession as a trespasser and could be sued by the mortgagor in ejectment without offering to redeem. **SHEIKH HUB ALI v. WAZIR-UN-NISSA** - - - - - 107

ONUS PROBANDI AS TO IRREGULARITY:

See REGISTRATION OF WILL.

OUDH LAND REVENUE ACT, 1876, c. viii.—Construction—Rights of Disqualified Proprietor:—Right to Contract Debts—Indian Contract Act, s. 16—Act VI. of 1899, s. 2—Bond set aside—Decree for Loan and Reasonable Interest.

According to the true construction of c. viii. of the Oudh Land Revenue Act, 1876, there is no prohibition, either express or necessarily implied, of a disqualified proprietor contracting debts or borrowing money. But he may not, without the sanction of the Court, create any charge upon his property.

In an action upon a bond executed by a disqualified proprietor, without the sanction of the Court:—

Held, that he was not incompetent to execute it, but that the position of the parties was such that the lender was "in a position to dominate the will" of the borrower within the meaning of s. 16 of the Indian Contract Act as amended

ODDH LAND REVENUE ACT, 1876—continued.
by s. 2 of Act VI. of 1899; and that he used that position so as to obtain an unfair advantage.

There having been concurrent findings of fact that the compound interest stipulated was unconscionable, and also that simple interest at 18 per cent. per annum would not have been high:—

Held, that the bond sued on must be set aside, but that there should be a decree for the principal sums actually lent, with simple interest at that rate. **DHANIPAL DAS v. RAJA MANESHAH BAKSH SINGH** - - - 118

PERSONA DESIGNATA: See HINDU WILL IN FAVOUR OF ADOPTED SON.

PETITION FOR SPECIAL LEAVE: See PRACTICE. 2.

POSSESSION: See MAHOMEDAN LAW.

POWER TO ADOPT: See HINDU LAW.

POWER TO ADOPT SUCCESSIVE SONS. See HINDU LAW.

PRACTICE—Concurrent Findings of Fact—Act 1 of 1869, s. 22 (4)—Treated in all respects as a Son.

Concurrent findings of fact that the appellant had not been treated in all respects by his maternal grandfather as his own son, within the meaning of s. 22 (4) of Act 1 of 1869; and that, according to the custom of the family, a daughter's son does not succeed to the property of his maternal grandfather, will not be disturbed.

Umrao Begam v. Irshad Husain, (1894) L. B. 21 Ind. Ap. 163, followed. **KUNWAL SANWAL SINGH v. RANI SATRUPA KUNWAR** - - 53

2. — Petition for Special Leave—Reasons of High Court for refusing Certificate.

Where a certificate for leave to appeal is refused by the High Court it is desirable that the reasons should be stated. **VENGANAT SWAROOPATHIL VALIA NAMBIDI AVERGAL v. CHERAKUNNATH** - - - 67

3. — Suit to set aside Transaction on the ground of Dementia—Undue Influence—Benami—Evidence of Gift.

A Mahomedan mother transferred nearly the whole of her estate or its proceeds to her daughter, partly by actual transfer and partly by purchases with the sale proceeds in the daughter's name.

In a suit by her son after her death to set aside these transactions on the ground of dementia:—

Held that, dementia not being proved, the plaintiff could not succeed on the ground of undue influence which had been neither alleged, nor investigated, nor proved;

Held, further, with regard to purchases in her daughter's name with the sale proceeds, and to transfers for consideration which was never paid, that the resulting inference that they were benami transactions was rebutted by the evidence of gift, and by the proved intention to exclude the son from inheriting. **ISMAIL MUSSAJEE MOOKERDUM v. HAFIZ BOO** - - - 86

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PRACTICE—continued.

4. — Appealable Amount — Sect. 596, C. C. P.

Where a plaintiff by his plaint claimed damages above the appealable amount, and the suit was dismissed without any determination as to the amount recoverable, and leave to appeal was refused by the High Court under s. 596, Civil Procedure Code, their Lordships granted special leave in that behalf. **MOULVI MAHOMED IKRAMUL HUQ v. WILKIE** - - - 106

See CIVIL PROCEDURE CODE, s. 462.

5. — Application to Stay Execution pending Appeal.

Where on an application for stay of execution the High Court had indicated an opinion that the same ought to be granted, an Order in Council to that effect was made on an undertaking by the petitioners to file their petition and case within a fortnight from the arrival of the record, with leave to the respondent to apply to the High Court for the appointment of a receiver, or for payment into Court, or other relief. **VASUDEVA MODELIAH v. SHADAGOPA MODELIAH** - - - 139

And see CIVIL PROCEDURE CODE, s. 462.

PREFERENTIAL RIGHTS OF CO-WIDOWER.

See HINDU LAW OF INHERITANCE IN BOMBAY.

REASONS OF HIGH COURT FOR REFUSING CERTIFICATE. See PRACTICE. 2.

REDEMPTION. See TRANSFER OF PROPERTY ACT.

REGISTRATION OF WILL—Presumption that it is duly effected—Onus probandi as to irregularity—Evidence as to Character of identifying Witnesses.

Under the Registration Act the registration of a will is performed in the presence of a competent official appointed to act as Registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present and are competent to act and are identified to his satisfaction:—

Held, that it will be presumed that all things done before him in his official capacity and verified by his signature have been done duly and in order; and that the evidence in this case was insufficient to prove that a deliberate fraud upon him had been successfully committed. Evidence as to the general reputation and character of the two identifiers of the testator before the Registrar, whose signatures were proved, is inadmissible to throw doubt upon the bona fides of the transaction. **GANGAMOYI DEBI v. TROILUCKHYA NATH CHOWDHRY** - 60

REGULATION XVII. OF 1806. See MORTGAGE BY CONDITIONAL SALE.

RENT PAYABLE TO THE LANDLORD: See GOVERNMENT REVENUE PAYABLE BY PUTNIDAR.

RIGHT OF APPEAL TO THE KING IN COUNCIL—Appellate Orders of the Governor of Bombay in Council—Decrees of Courts of Political Agents in Kathiawar—British Political Tribunals in a Foreign State—Courts

RIGHT OF APPEAL TO THE KING IN COUNCIL—continued.

established by the Executive for Political Purposes—Suits to enforce and Redeem a Mortgage.

The intention of the British Government is and always has been that the jurisdiction exercised in connection with the province of Kathiawar should be political and not judicial in its character; the ultimate appeal being to the Secretary of State for India in Council. Kathiawar is not as a whole within the King's dominions. It has been controlled by the British Indian Government for a very long period in different degrees in its various component States, but has never been treated as British territory or as subject to the laws in force in the Bombay Presidency or enacted by the British Indian Legislature. Nor has there been any authoritative assertion of territorial sovereignty therein. A system of judicial administration has been established therein, not by legislation, but by orders of the Executive Government, the judicial officers being Assistant Political Agents, with an appeal to Political Agents to deal with cases both political and civil. In the former cases their functions are "diplomatic and controlling," deciding as they "think proper"; in both the intention of the Government is and has been that the jurisdiction exercised should be guided by policy rather than by strict law:—

Held accordingly in two suits, one classed as civil to enforce a mortgage, and the other classed as political to redeem a mortgage, brought in the Courts of Assistant Political Agents in Kathiawar, that an appeal does not lie from appellate orders therein passed by the Governor of Bombay in Council to His Majesty in Council. **HEMOHAND DEVOHAND v. AZAM SAKARLAL CHHOTAMLAL.**

RIGHT TO CONTRACT DEBTS: *See* OUDH LAND REVENUE ACT, 1876.

RIGHTS AND DUTIES OF WIDOWS: *See* HINDU LAW OF ADOPTION.

RIGHTS OF DISQUALIFIED PROPRIETOR: *See* OUDH LAND REVENUE ACT, 1876.

SALE IN EXECUTION OF A CERTIFICATE: *See* BENGAL ACT VII. OF 1880, SS. 12, 16, 17, 24.

SERVICE TENURES—Grantees willing to perform them—Lands not liable to Resumption.

A zemindar has no right to resume grants of land which have been made subject to a burden of service, so long as the grantees or holders are willing and able to perform the services incident to their tenure, whether they are required or not.

Rajah Leelanund Singh v. Thakoor Munoorunjun Singh, (1873) L. R. Ind. Ap. Supp. Vol. 181, followed.

Upon an issue of fact whether a grant was on a service tenure or in lieu of wages, it appeared that no designated office was conferred, but an obligation of a feudal character was imposed, that when services were exacted they

SERVICE TENURES—continued.

were paid for in money, that a uniform rent had been paid for 120 years without alteration, that the lands had descended by inheritance, in either case without any claim of interference, and that there had been no instance of an attempt to resume:—

Held, that it was established that the lands were held on a fixed tenure, and were not resumable. **SRI RAJA VENKATA NARASIMHA APPA RAO BAHADUR ZEMINDAR GARU v. SRI RAJA SOBHANADRI APPA RAO BAHADUR ZEMINDAR** - - - - - 48

STRIDHAN: *See* HINDU LAW OF INHERITANCE IN BOMBAY.

SUIT FOR POSSESSION: *See* LIMITATION. 1.

SUIT TO SET ASIDE TRANSACTION ON THE GROUND OF DEMENTIA: *See* PRACTICE. 3.

SUITS TO ENFORCE AND REDEEM A MORTGAGE: *See* RIGHT OF APPEAL TO THE KING IN COUNCIL.

SUPERINTENDENCE OVER RESIDENTS' COURTS AT ADEN: *See* JURISDICTION OF HIGH COURT.

TRANSFER OF PROPERTY ACT, s. 95—Construction—Charge on the Interests of Co-mortgagors—Redemption—Contribution.

Sect. 95 of the Transfer of Property Act says that "where one of several mortgagors redeems the mortgaged property and obtains possession thereof," he has a charge on the shares of his co-mortgagors for contribution to his expenses "in so redeeming and obtaining possession":—

Held, that the section must be construed distributively, and that the charge follows on redemption; the condition of obtaining possession applies only to cases in which its fulfilment is from the nature of the mortgage possible.

Where one of three mortgagors paid off the mortgage debt in full and then sued the other two to recover the whole amount paid with interest alleging that he was a surety only:—

Held, that on failure to prove an agreement of suretyship he was nevertheless entitled to recover two-thirds, and that although neither he nor the original mortgagee had obtained possession of the mortgaged property the decree ought to give him a charge on the respondents' interests therein. **MALIK AHMAD WALI KHAN v. MUSAMMAT SHAMSI JAHAN BEGAM** - 81

TREATED IN ALL RESPECTS AS A SON: *See* PRACTICE. 1.

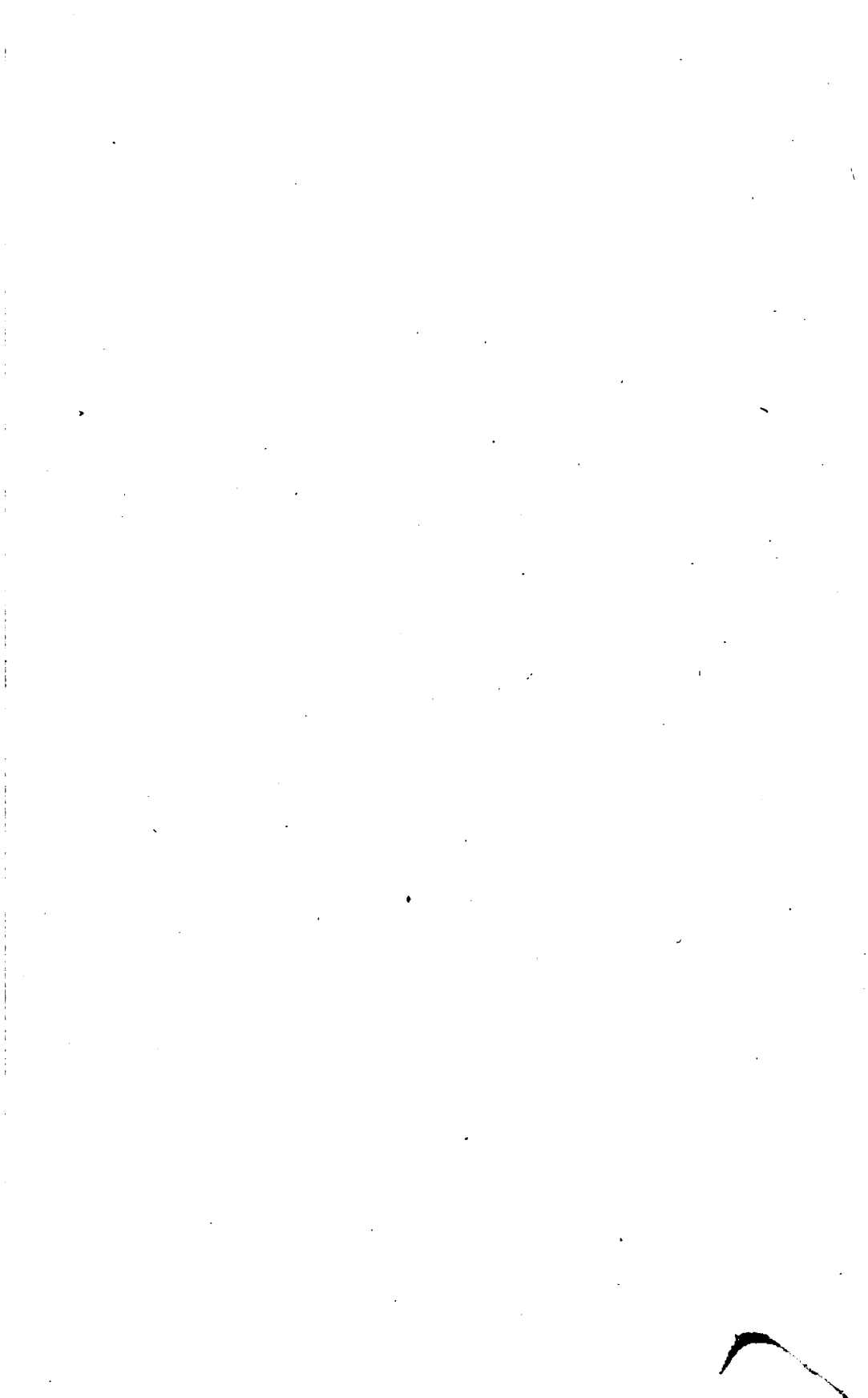
TURNS OF MANAGEMENT: *See* MANAGEMENT OF HINDU TEMPLE.

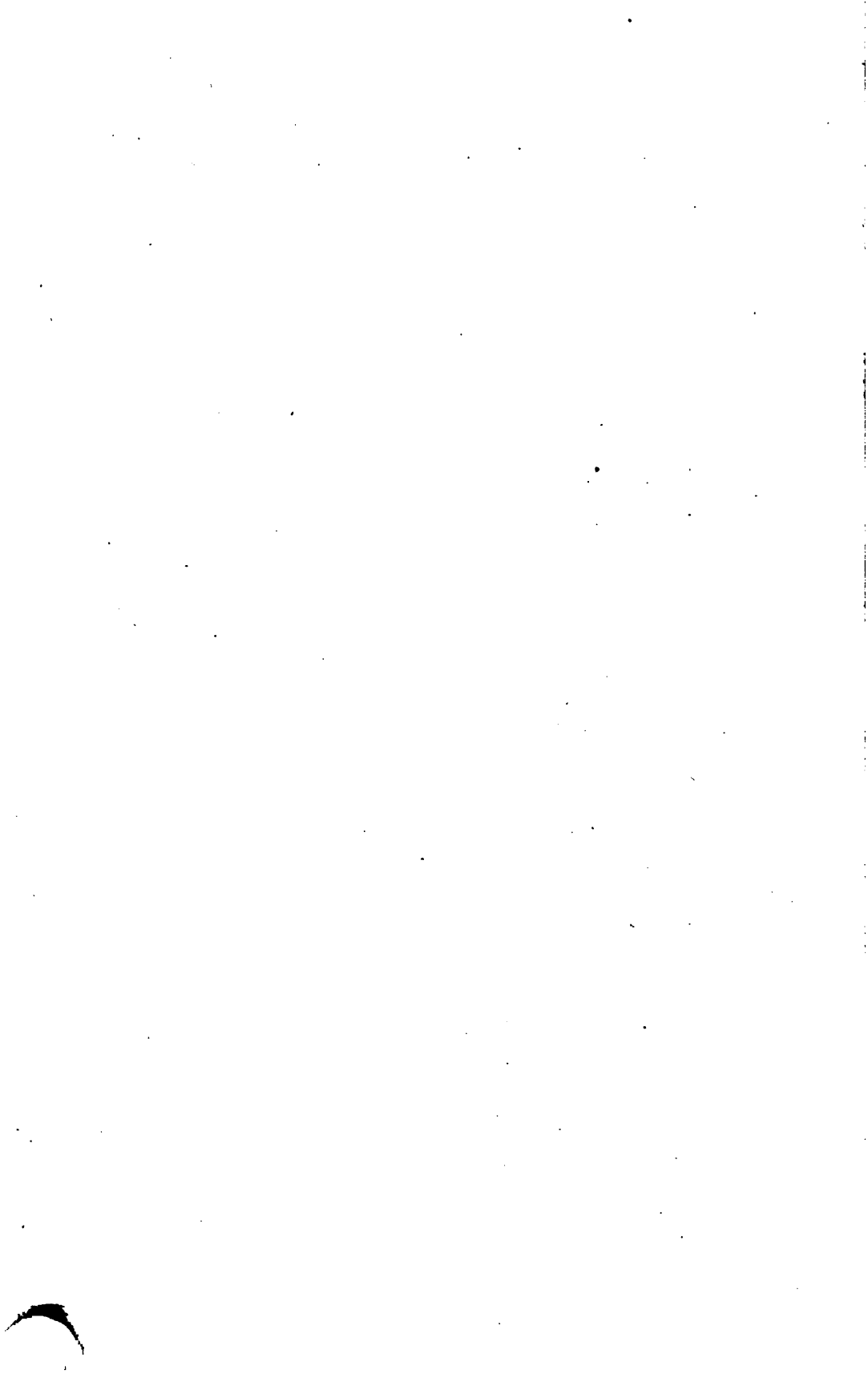
UNDUE INFLUENCE: *See* PRACTICE. 3.

USUFRUCTUARY CLAUSE CONTROLLED BY THE CONTEXT: *See* MORTGAGE.

WAJIB-UL-AHZ: *See* HINDU WILL IN FAVOUR OF ADOPTED SON AND MORTGAGE BY CONDITIONAL SALE.







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